

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7426

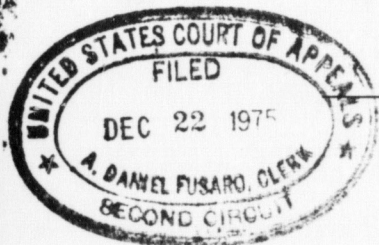
IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7426

Bp/s



IRVING STOLBERG,

Plaintiff-Appellant,

—v.—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES
OF THE STATE OF CONNECTICUT, etc.,

*Defendants-Appellees
and Respondents-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOINT APPENDIX

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Docket No. 75-7426

IRVING STOLBERG,

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—v.—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES
OF THE STATE OF CONNECTICUT, etc.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Relevant Docket Entries

1969

12/15 Verified Complaint, filed. Summons issued and together with copies of same and of complaint, handed to Marshal for service.

* * * * *

1970

1/ 9 Answer and Defenses, filed.

* * * * *

1971

5/ 6 Defendants' Pretrial Memorandum, filed.

* * * * *

Relevant Docket Entries

5/10 Pretrial Report of Special Masters H. Meade Alcorn, Jr. and R. C. Dixon filed. Defendant will file amendment to answer, adding a special defense, within 7 days. Assignment for trial—after 40 days, at first court session. So ordered. Zampano J. Copies mailed 5/11/71. M-5/13/71.

* * * * *

12/ 2 Court Trial Commences. Plaintiff's Exhibits 1 thru 7 filed. Outline Memorandum of Points and Recent and Leading Authorities, filed. Plaintiff, Irving Stolberg, sworn and testified. Plaintiff's Exhibits 8 & 9, filed; 10 marked for identification. 7 Plaintiff's witnesses sworn and testified. Case recessed at 3:45 P.M. Blumenfeld, J. M-12/3/71.

12/ 7 Court Trial Continues. Counsel requested that they meet with the Court in Chambers—Request granted. Counsel excused at 1:00 P.M. and case recessed. The parties are to inform the Court on Thursday, Dec. 9th if the negotiations were successful, or, if the trial shall be resumed. Blumenfeld, J. M-12/8/71.

* * * * *

12/21 Transcript of trial on December 2, 1971, filed at Hartford. (Olson, R.)

12/21 Court Trial Resumes. Mr. Stolberg resumed stand. Plaintiff's Exhibits 11, 12, 13, 14, 15, 16-A, 16-B, 17, 18, 19, 20, filed. Defendants' Exhibits A & B, filed. Plaintiff rests with the exception of documents to be submitted by stipulation. Defendant offers no evidence. Decision Reserved. Plaintiff's brief by Dec. 29th; Defendant may reply within 1

Relevant Docket Entries

week. Plaintiff may respond by brief 1 week thereafter. Plaintiff's Motion to Amend Complaint to Conform with the Evidence, filed. Court adjourned at 11:20 A.M. Blumenfeld, J. M-12/22/71.

- 12/22 Transcript of trial on December 21, 1971, filed with Judge Blumenfeld. (Federal Reporters, R.)

* * * * *

1972

- 2/16 Defendants' Post-Trial Brief, filed at Hartford.
- 2/29 Memorandum of Decision, Findings of Fact and Conclusions of Law, filed. Ordered (1) That the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at SCSC for the 1972-73 school year with the same seniority as if his contract had been renewed in 1969; and (2) That the defendants Buley, Creed, Grasso, Richard Gurney, Margaret Gurney, Niejadlik, Wood and Smith pay the sum of \$9,000.00 to the plaintiff as damages. Blumenfeld, J. Copies mailed from Hartford to Attorneys Winer and Giber. M-3/2/72.
- 3/ 7 Judgment entered (1) That the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at Southern Conn. State College for the 1972-1973 academic year with the same seniority as if his contract had been renewed in 1969; (2) That the plaintiff recover of the defendants Hilton C. Buley, Clark Edwin Creed, Thomas A. Grasso, Richard Gurney, Margaret Gur-

Relevant Docket Entries

ney, Bernice C. Niejadlik, Alvin V. Wood and J. Eugene Smith, the sum of \$9,000.00 as compensatory damages; and (3) that the plaintiff recover no compensatory damages of the defendants Frank P. Cammarano, Russell Fitz, Ernest A. Johnson, Laura Johnson, James I. McNally, John F. Robinson and Walter Werner. Earl, C. Approved: Blumenfeld, J. M-3/7/72. Copies mailed to all counsel.

- 3/17 Plaintiff's Combined Motion under Rules 52 and 59 for Amended and Additional Findings, for Alteration for Amendment of Judgment, and/or for New Trial on the Issue of Damages for Additional Hearing on Such Issue and Notice of Motion, filed by Plaintiff.

* * * * *

- 4/10 Hearing on Plaintiff's Combined Motion under Rules 52 and 59 for Amended and Additional Findings, for Alteration, For Amendment of Judgment, and/or for New Trial on the Issue of Damages, For Additional Hearing on Such Issue. Decision Reserved. Blumenfeld, J. M-4/11/72.

- 4/27 Decision on Plaintiff's Motion to Amend Findings and Judgment and for Partial New Trial, entered. " * * * . After reviewing the evidence, the court adheres to its original findings of fact, conclusions of law, and judgment. See Memorandum of Decision, *supra*, at 10-11. The motions are denied " So ORDERED. Blumenfeld, J. M-4/27/72. Copy handed Atty Winer. Copies mailed Attys Pulaski, Ahern and Beizer.

Relevant Docket Entries

- 5/25 Notice of Appeal, filed by Plaintiff. Copy handed Atty Winer; copy mailed to Asst. Atty. Gen. Giber.

* * * * *

1973

- 4/ 5 True copy of Judgment and Opinion of the U.S. Court of Appeal, filed, affirming in part and reversing in part the judgment of the District Court and remanding action for further proceedings, with costs to be taxed against the appellees. Fusaro, C. U.S.C.A. M-4/5/73.

* * * * *

1974

- 12/16 Verified Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, filed by Plaintiff.
- 12/16 Order to Show Cause entered for appearance at Hartford on Jan. 7, 1975. at 9:00 A.M. Blumenfeld, J. Return to be filed by Jan. 3, 1975. M-12/18/74. Copies mailed.

* * * * *

1975

- 1/ 6 Answer to Petition for Contempt Judgment, filed by all defendants and respondents.
- 1/ 6 Brief in Opposition to Petition for Contempt Judgment, filed by defendants and respondents at Hartford.
- 1/ 7 Hearing re Order to Show Cause. Plaintiff's Exhibits 1 thru 6, filed. 4 Plaintiff's witnesses sworn and testified. Decision Reserved. Brief by Plain-

Relevant Docket Entries

tiff due 1/13/73. Reply Brief by Defendant by 1/17/75 if defendant chooses to do so. Blumenfeld, J. M-1/9/75.

- 1/13 Court's Reporter's Transcript of proceedings held on Jan. 7, 1975. (Order to Show Cause), filed. Col-lard, R.

* * * * *

- 1/31 Supplementary Stipulation dated 1/31/75, filed at Hartford.

- 1/31 Amendment to Verified Application and Petition for Issuance of Order to Show Cause and for Con-tempt Judgment, filed at Hartford.

- 3/18 Affidavit of Louis M. Winer, dated March 10, 1975, filed.

* * * * *

- 4/10 Plaintiff's Memorandum In Support Of Verified Ap-plication And Petition for Issuance Of Order To Show Cause And For Contempt Ju^d-ment And In Support Of Relief Sought Therein, filed at Hart-ford.

* * * * *

- 6/ 2 Reply Brief of Defendants and Respondents, filed.

- 6/11 Notice Of Motion And Motion For Interim Order Re Salary Payments, Affidavit of Irving Stolberg, Dated May 17, 1975, Affidavit of Louis M. Winer, Dated June 10, 1975, med by plaintiff.

- 6/12 Plaintiff's Memorandum in Support Of Motion For Interim Order Re Salary Payments, filed.

Relevant Docket Entries

6/23 Memorandum of Decision filed and entered. The motion for a contempt judgment is denied. It is SO ORDERED. Blumenfeld, J. M-6/24/75. Copies Mailed.

* * * * *

6/25 Judgment filed and entered denying the motion for contempt judgment. Markowski, C. M-6/25/75. Copies mailed.

6/27 Hearing on Plaintiff's Motion for Interim Order Re: Salary Payments. Denied. Blumenfeld, J. M-6/30/75.

6/27 Order endorsed on Plaintiff's Motion for Interim Order re Salary Payments, as follows: "Motion denied after hearing held subsequent to clarification of judgment and denial of motion for contempt." 6/27/75 M.J.B. M-6/30/75. Copies mailed.

7/10 Court Reporter's Transcript of proceedings held on 6/27/75 (motion), filed. (Collard, R.)

7/21 Notice of Appeal, filed by Plaintiff. Copies mailed.

Verified Complaint

[Demand for judgment for relief only]

• • • • •

WHEREFORE, plaintiff pray: that this Court:

(a) assume jurisdiction of this cause pursuant to Sections 1331 and 1343 of Title 28, United States Code;

(b) decree and order such equitable relief as is appropriate in the circumstances, and, in particular order:

(1) that defendants reinstate plaintiff as an Assistant Professor at Southern Connecticut State College with all the rights and privileges of one who has completed his probationary period without being terminated or denied tenure for any just cause; and

(2) that defendants or any of them or their successors or the successor of any of them refrain from in any way discriminating against the plaintiff for his political conduct or expression;

(c) grant plaintiff a trial to the court on the issue of damages sustained by him and, upon such trial, award plaintiff compensatory damages in the amount of One Hundred Thousand Dollars (\$100,000) and exemplary damages in the amount of One Hundred Thousand Dollars (\$100,000), plus an additional amount for reasonable attorneys' fees.

Verified Complaint

(d) order such other appropriate relief as is deemed just and proper.

THE PLAINTIFF

BY LOUIS M. WINER

A Member of the Firm of

Tyler, Cooper, Grant,

Bowerman & Keefe

205 Church Street

New Haven, Connecticut

His Attorneys

Of Counsel:

TYLER, COOPER, GRANT, BOWERMAN & KEEFE

205 Church Street

New Haven, Connecticut

Answer and Defenses

First Defense

The Complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

The complaint, naming officials of the State of Connecticut acting in their official capacities, constitutes suit against the sovereign State of Connecticut. The State as sovereign is immune from suit under the Constitution of the United States and under the Federal Civil Rights Act.

Third Defense

The relief requested, to wit: "reinstate plaintiff as an assistant professor at Southern Connecticut State College with all the rights and privileges of one who has completed his probationary period without being terminated or denied tenure for any just cause", is outside the purview of the Federal Civil Rights Act and constitutes an order against the State of Connecticut which is not subject to this Court's jurisdiction in the instant action.

Fourth Defense

Plaintiff never has had as a probationary employee the right to a hearing upon denial of tenure.

Fifth Defense

Plaintiff never has had as a probationary employee the right not to be denied tenure except for cause shown.

*Answer and Defenses**Sixth Defense*

The Court lacks jurisdiction over seven (7) named defendants, enumerated infra, as there is a failure to timely serve process upon each of said named defendants in accordance with F.R.C.P., rule 4 and to have prompt return of service made to Court.

The following seven named individual defendants have not been timely served with process:

- (1) Russell Fitz
- (2) Frank P. Cammarano
- (3) Margaret Gurney
- (4) Richard Gurney
- (5) Ernest A. Johnson
- (6) Bernice C. Niejadlik
- (7) Walter Werner

Seventh Defense

The defendants admit the allegations contained in paragraphs 3 through 19, 22, 29, 37, 47 and 49 of the complaint; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 20, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 38, 40, 41, 42, 43, 44, 45, and 48 of the complaint; and deny each and every other allegation contained in the complaint.

ROBERT K. KILLIAN
Attorney General

By: DAVID B. BEIZER
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Defendants' Pretrial Memorandum

I. FACTS

Plaintiff beginning in September, 1966 was hired as a probationary teacher at Southern Connecticut State College, (SCSC), a State institution. The plaintiff had his employment terminated as of June 30, 1969, prior to completing his working test period. The rules of the Board of Trustees for the State Colleges (Board) which will be made an exhibit at trial, do not require giving reasons for denying tenure. The Board by statute establishes the "terms and conditions of employment". § 10-109b, Conn. Gen. Stats., as amended. Teachers in the state college system, by statute, are "unclassified employees" and may be granted tenure only in accordance with rules established by the Board. The plaintiff was notified by the defendant President of SCSC, Dr. Hilton C. Buley, on February 27, 1969, that he would not be granted tenure. The decision not to grant tenure to the plaintiff was the result of the deliberations and judgment of an entirely independent body of fourteen known as the Committee on Tenure and Promotions. The defendant President of SCSC was not a member of this committee and did not participate in the decision making process of said committee. The named defendants, including President Buley, strongly dispute the truth of the plaintiff's allegations; they contend that at no time were any "reasons" given by President Buley for the action taken in 1969 nor for the action which took place in 1968 (a decision not to recommend renewal of plaintiff's contract, which decision was later rescinded.)

The plaintiff was granted an interview on June 5, 1968 with the Personnel Committee of the Board and the Board

Defendants' Pretrial Memorandum

did not intervene to change the decision not to grant tenure to the plaintiff.

The defendants further direct the Court's attention to the fact that in 1970 the plaintiff was a successful candidate for State Representative. On January 6, 1971 he was sworn in as a member of the Connecticut General Assembly in that capacity.

II. THE LAW

The law is clear that probationary employees do not have rights such as claimed by the plaintiff under the Civil Rights Act. In numerous cases analogous to the instant one the courts have uniformly held that a probationary employee in the absence of contrary legislation is not entitled to the protective procedures accorded a career or permanent employee. See *Jaeger v. Freeman*, 410 F.2d 528 (5 Cir. 1969); *Medoff v. Freeman*, 362 F.2d 472 (1 Cir. 1966); *Morris v. Gantz*, Civ. No. 13,044 (D. Conn. 1969); *Tichon v. Harder*, 308 F. Supp. 839 (D. Conn. 1970) aff'd Slip Opinion No. 222, 2d Cir., Feb. 18, 1971; *Parker v. Board of Education*, 237 F. Supp. 222 (D. Md. 1965) aff'd 348 F. 2d 464 (4th Cir. 1965) cert. denied 382 U. S. 1030 (1966); *Jones v. Hopper*, 410 F. 2d 1323 (10th Cir. 1969) cert. denied 38 U. S. L. W. 3370.

The very concept of "probation" precludes any requirement that the administrative agency involved need show cause why the individual employee not be granted tenure. Probation is the complement to a wide discretion being lodged in the administration to decide who receives tenure. Admittedly, tenure cannot be denied a person for reasons that would violate an individual's constitutionally protected

Defendants' Pretrial Memorandum

rights; however, tenure can be denied for no reason at all. *Freeman v. Gould Special School District of Lincoln County, Ark.*, 405 F.2d 1153 at 1158.

Plaintiff claims that he never received a review of the decision made at SCSC by the Board. The "hearings" before the Personnel Committee of the Board would not measure up to due process standards in court litigation involving guilt or innocence. However, this was never the purpose of hearings before this committee of the Board. It was never conceived or offered as an adversary proceeding. Perhaps the use of the word "appeal" in Section VI A of the Rules of the Board was semantically inappropriate. However, the use of that single word does not justify the claim for procedures advocated by the plaintiff. A like procedure was employed in a school district in Arkansas and was held not to be a denial of due process in the review procedure. See *Freeman v. Gould Special School District of Lincoln County, Ark.*, *supra*.

When the plaintiff became a member of the General Assembly of the State of Connecticut, he became ineligible for the orders he seeks. The Connecticut Constitution Article III, Section 11 provides:

"No member of the general assembly shall during the term for which he is elected, hold or accept any appointive position in the judicial or executive department of the state government . . ."

Section 2-5 of the Connecticut General Statutes provides:

"No member of the general assembly shall, during the term for which he is elected, be nominated, appointed

Defendants' Pretrial Memorandum

or elected by the governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government . . .”

Thus, even if the plaintiff had been a teacher with tenure, upon becoming a member of the general assembly he would have to resign his position as a teacher. Even a “leave of absence” would not be sufficient as this would be merely “a vacation without pay”. Pursuant to the aforementioned rules of the Board, any teacher, even one who has been granted tenure, who leaves the State College system loses his tenure; in the event he again is employed by the State College system he must again become a probationary teacher and go through the working test period. Therefore, even if this Court should decide the factual and substantive legal issues in favor of the plaintiff, it cannot grant the mandatory injunctive relief sought because the plaintiff has voluntarily cut himself off from his prior period of employment.

DEFENDANTS

BY ROBERT K. KILLIAN

Attorney General

SIDNEY D. GIBER

Assistant Attorney General

Pretrial Report

Date of Conference: April 22, 1971

Attorneys Present:

LOUIS M. WINER
For Plaintiff

SIDNEY D. GIBER
For Defendant

I

NATURE OF ACTION

Dismissed state college teacher seeks reinstatement and damages; teacher is presently a member of the state legislature.

II

JURISDICTION

Conceded.

III

PLEADINGS

Defendant will file amendment to answer, adding a special defense, within 7 days.

IV

DISCOVERY PROCEEDINGS

Plaintiff will complete all discovery, including depositions, within 40 days.

17a

Pretrial Report

V

SPECIAL DAMAGES

VI

LISTS OF WITNESSES

Plaintiff will file list within 7 days.

VII

LISTS OF EXHIBITS

Plaintiff will file list within 7 days.

VIII

CLAIMS OF FACT AND LAW

Filed.

IX

REQUESTS TO CHARGE

Will be filed on first day of trial.

X

SETTLEMENT

Parties will prepare a stipulation of facts designed to shorten the trial.

Pretrial Report

XI

ASSIGNMENT FOR TRIAL

After 40 days, at first court session.

XII

STIPULATION

Counsel for all parties stipulated that this Pretrial Report may be "So ORDERED" by the Court; and counsel further stipulated that all proceedings under Rule 53, Fed. R. Civ. P., are waived.

Dated at Hartford, Connecticut, this 22nd day of April, 1971.

H. MEADE ALCORN, JR.
Special Master

RALPH C. DIXON
Special Master

SO ORDERED:

R. C. ZAMPANO
U.S.D.J.

5/7/71
Date

Defendants' Post-Trial Brief

The defendant Buley was the President of Southern Connecticut State College during the time in question, the defendant Smith was the Executive Secretary of the Board of Trustees for the State Colleges, and the remaining defendants are members of the Board of Trustees for the State Colleges.

The plaintiff was denied tenure. The plaintiff alleges that he was denied tenure because of his exercise of his First and Fourteenth Amendment rights and that he was denied due process and equal protection of the laws in the deprivation of such rights and further alleges that he is entitled to relief under the provisions of 42 U.S.C. Secs. 1983, 1985(3) and 1986.

The plaintiff in his brief sets out the main contested issues and omits the need to determine the facts. Whereas, in fact, it is the defendants' belief that the plaintiff has failed to prove his case.

At issue here is whether the employer in electing not to renew an employment contract for a probationary teacher is compelled to give reasons for the non-renewal and whether or not the probationary teacher is entitled to a hearing and whether or not in fact he did receive a hearing.

The plaintiff, in his complaint, has made allegations of denial of constitutional rights; however, as is plain from the plaintiff's own lips, the plaintiff was never prevented from exercising his constitutional rights. A material matter, prior restraint was not proved in this case.

The plaintiff testified as to his meeting with the then President of Southern Connecticut State College, Dr.

Defendants' Post-Trial Brief

Hilton Buley; Dean Middlebrooke; and Dean Kuslan, where in fact, he was given examples of his less than professional conduct. If the defendants determined that the plaintiff as a probationary employee was thus undesirable for continued employment, they had a discretionary right and indeed a duty not to renew the employment relationship. See in this regard *Adler v. Board of Education*, 342 U.S. 485 (1952). If the law were otherwise, there would be no freedom of contract and public employees could practice the rankest form of insubordination, then safely hide behind the right of free speech and be guaranteed absolute and permanent tenure.

Another consideration enters here. The plaintiff seems to refer to speech as an absolute. It is well recognized that not all speech is protected or worthy of protection. A person can be held accountable for his misrepresentations. One must bear the consequences if he actively incites a riot. The federal government through the Hatch Act may properly bar its employees from certain types of political activity. No person carries with him into the United States Congress, any state legislature, into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on anything he pleases. Rights of free speech and assembly do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time and in any manner. See in this regard *Adderly v. Florida*, 385 U.S. 39 (1964); *Kovacs v. Cooper*, 366 U.S. 77 (1949); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Waugh v. Mississippi University*, 237 U.S. 589 (1915).

Defendants' Post-Trial Brief

The defendants agree that public institutions of higher learning are not free to withhold renewal of a probationary instructor's contract for reasons that violate his First Amendment or other substantive constitutional rights. However, colleges should be free to withhold renewal of a probationary instructor's contract if to do so would foster academic excellence.

The architects of the tenure system sought to preserve both free discussion for instructors and quality education for students. Those who were close to the problems of the academic community weighed these factors and arrived at the existing tenure system of which a testing, or probationary, period is a part. The plaintiff would have us alter the system by providing for a written statement of reasons and an adversary hearing before a probationer's contract can be permitted to expire without renewal.

Concern for the protection of First Amendment rights has prompted some of the U.S. Circuit Courts of Appeal to require the procedural protection of a hearing with notice to the plaintiff even though he has not attained tenure. Yet the tenure system as it exists today in almost all colleges was fashioned from the same concern. Moreover, vigorous public debate as envisioned by the First Amendment depends upon a well educated citizenry. The provision for a probationary period prior to the security of tenure strengthens education, which in turn gives substance to the rights guaranteed by the First Amendment.

The hearing conceived by the other Circuits would be ineffective in protecting substantive constitutional rights. Whether or not effective, a hearing would burden college faculty and administrators and would interfere with their

Defendants' Post-Trial Brief

duty to strive for quality education. Any hearing which is effective would obliterate the distinction between tenured and probationary faculty.

The Supreme Court has stated that the Constitution "does not require a trial-type hearing in every conceivable case of governmental impairment of private interest." *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 894 (1961).

The Circuit Courts which have adopted this new rule have sought to substitute the judgment of the courts for that of legislatures, governing boards, and college administrators and faculty bodies across this nation to provide a hitherto unprecedented modification of the tenure system. This exercise in constitutional fiat lacks the benefits of years of trial and experience that went into the evolution of the tenure system. In view of the central position of higher education in the scheme of our fundamental liberties of thought, inquiry and expression, it was error, and an insidious danger not contemplated by the Courts, so to exercise the Courts' jurisdiction in the absence of clear constitutional mandate.

We should point out that there is a necessary imprecision of standards governing non-renewal decisions and other similar decisions which is in sharp contrast to standards governing dismissal of a tenured faculty member for cause.

We feel that the Courts in the circuits differing with our view must have been struck by the incongruity of, on the one hand, hiring the instructor and then a few short months later, deciding not to retain the instructor. We should point out that the standards applied to an instructor for a new appointment must necessarily be dif-

Defendants' Post-Trial Brief

ferent from the standards applied in the non-renewal of contrast situation. There is no reliable way of separating a judgment of comparative competence and integrity from judgments of many other personal traits, social graces, congeniality. Therefore, the judgments must be made on the basis of key factors indicating lack of maturity or soundness of judgment, such as incidents in a school cafeteria or a neophyte having the unmitigated gall and ego to take to task the President of a nearby college who is in the midst of serious student difficulties.

Until the present time, it has been an academic custom and practice under the tenure system not to provide probationary instructors with the reasons for non-renewal of his contract. While in the instant case, the instructor was provided with examples of his poor judgment, nevertheless we subscribe to the belief that it was not necessary to give any reasons for the non-renewal of his contract. Traditionally, colleges have not provided a statement of reasons for the non-renewal of a probationary instructor's contract and have required faculty members and officers to keep their deliberations confidential. There are several sound reasons for this policy. Most important, it has been recognized that colleges should have wide latitude in determining who should be retained and ultimately granted tenure. Since the reasons may be subtle and difficult to articulate, a faculty colleague or administrator may be hesitant to recommend or even contemplate non-renewal if he is required to state publicly his justification. Disclosure would undoubtedly have a *chilling* effect on unfettered discussion among the responsible persons. Preserving the confidentiality of the reasons also protects the instructor who must

Defendants' Post-Trial Brief

find other employment. It might even be argued that an instructor who asks for reasons cannot complain if, when given, they reflect adversely upon him. However, if reasons are available to one who seeks them, a prospective employer may draw an adverse inference from failure to seek them. Therefore, an instructor seeking other employment would be under substantial pressure to request a statement of the reasons for the non-renewal of his contract and to divulge them to a prospective employer.

The defendants strongly urge this Court to consider the practical effect of invoking the procedures sought by the plaintiff would have on men and women who must make renewal decisions. Many of them are not administrators. These academic personnel are not inclined to relish the handling of *dossiers*, the preparation of administrative memoranda and attendance at innumerable hearings and meetings. There is a clear danger that a decision in favor of the plaintiff will lead to an abrogation by college personnel of their traditional evaluative functions. An obvious result will be the attainment of tenure by default and this would result in immeasurable harm to the educational program by depriving students of the best judgment of college faculty and administrators in deciding who merits tenure.

The existing tenure system strikes the proper balance referred to in *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961). The existing tenure system allows for the merit selection of tenured faculty members while protecting academic freedom to the fullest practical extent. Not every harm or possible arbitrariness to the citizen can be protected by the constitution. The probationary instructor who sincerely believes his First Amendment

Defendants' Post-Trial Brief

rights were violated may seek redress in the federal or state courts for violation of his civil rights and have full benefit of discovery process to unearth evidence and prove his charges. Indeed in this case the plaintiff has fully exercised every conceivable discovery right available to him, has had the insight into all the proceedings of the various bodies involved and with all these available to him the logic of his progressions to a conclusion of a violation of his substantive constitutional rights escapes us. Therefore, this forum is available and there is no need to significantly impair the functioning of the public colleges.

The plaintiff has in his brief made several references to the defense counsel consenting to the reinstatement with tenure of the plaintiff to his position at Southern Connecticut State College. The Transcript at page 172 clearly indicates that this was an inadvertant reference to the futile attempts at settlement of this case.

The defendants are firm in their position that the evidence does not warrant a finding that they have violated the First Amendment rights of the plaintiff nor any of his other substantive constitutional rights, that the Court should find in favor of the defendants on all counts in this matter.

Further, in the plaintiff's brief, item 10. Equitable Relief, the plaintiff tries to insert part of the attempted settlement procedures of this matter. The plaintiff states, "... in light of the desirability of avoiding as far as possible the use of judicial compulsion upon educational institutions, plaintiffs submits that it would be appropriate for the Court to reserve jurisdiction over the equitable aspects of this action to permit the parties to arrange

Defendants' Post-Trial Brief

the manner in which reinstatement may be achieved . . ."

The defendants respectfully submit that they have complied with all the orders of the Courts in existence at the time this litigation arose and that they are entitled to the full resolution of all matters which the plaintiff has claimed.

Respectfully submitted,

DEFENDANTS

By ROBERT K. KILLIAN
Attorney General

SIDNEY D. GIBER
Assistant Attorney General
Their Attorneys
30 Trinity Street
Hartford, Connecticut 06115

Memorandum of Decision, Findings of Fact and Conclusions of Law

The plaintiff in this case, Irving Stolberg, complains that his teaching contract at Southern Connecticut State College (SCSC) was not renewed for the school year 1969-70 and that he was thereby denied tenure in retaliation for the exercise of first amendment rights. He seeks equitable relief, in the form of reinstatement, and compensatory and punitive damages against the former president of SCSC and the members of the board of trustees for the state colleges of Connecticut at the time of the alleged wrong. He brings this action under 42 U.S.C. § 1983.¹ The court is vested with jurisdiction by 28 U.S.C. § 1343 (3). See *Tichon v. Harder*, 438 F.2d 1396, 1400 (2d Cir. 1971), and cases cited therein.

I.

The plaintiff was employed as an instructor in geography at SCSC beginning with the 1966-67 school year. During this year and the subsequent year he became involved in a variety of civil rights activities and organized opposition to the Vietnam war. Under the existing regulations and practice, teachers who satisfactorily completed three years in probationary status were given tenure.

¹ 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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In February 1968, during the plaintiff's second year at SCSC, the defendant Buley, then president of the college, informed the plaintiff that his contract would not be renewed for the 1968-69 school year. He gave three reasons for nonrenewal: (1) the plaintiff had sent a letter three days earlier to fellow teachers at the college inviting them to participate in a demonstration in New Haven, Connecticut, against the Vietnam war; (2) the plaintiff on December 1, 1967, had sent a letter to the president of Albertus Magnus College in New Haven suggesting that she had arbitrarily suspended a number of students and offering the mediation services of the American Association of University Professors, a local chapter of which the plaintiff was then president; (3) complaints (never substantiated) had been made by a cafeteria worker that the plaintiff had not paid for certain cups of coffee on the "honor system" in the school cafeteria. Buley also stated that the plaintiff did not "fit" at SCSC. There was considerable testimony at trial to the effect that an ideological gulf existed between the plaintiff and Buley; and statements by Buley to the board of trustees implied that he deemed the plaintiff a subversive influence who had been trained to manipulate "a small hard core of militant students."

The plaintiff appealed Buley's decision to the personnel committee of the board of trustees, charging that his contract was not being renewed because of his political beliefs. The plaintiff appeared before the committee at a lengthy hearing on June 5, 1968, at which he was questioned solely about his political and moral convictions. There was no discussion of his competency as a teacher.

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Under the applicable regulations a probationary teacher could be dismissed upon receiving two unsatisfactory service ratings within a given time period or for unprofessional conduct after a full investigation. The plaintiff was never given an unsatisfactory rating; and the misconduct with which he might have been charged² was never fully investigated.

Subsequent to the hearing before the personnel committee on June 5, 1968, the board of trustees affirmed Buley's decision. The plaintiff thereupon asked for reconsideration on the ground that the procedures employed by the committee violated due process of law.

At this point the records of the board of trustees show that the board sought the advice of the Attorney General of the state. In several meetings with various segments of the board, the Attorney General stated his opinion that the board had proceeded illegally in upholding Buley's decision. According to the minutes of the board of trustees, at a meeting in July:

"the Attorney-General again expressed his opinion of the proceedings of the (Personnel) Committee, and he advised President Buley that he had little to stand on in view of the appeal clause in the Personnel Policies of the Board. He also advised that the Board was in a bad position. President Buley thereupon, with the thought that the Board would rescind the appeal clause, volunteered to rescind his notification to Stolberg of the previous February."

² The plaintiff was not told by the board of trustees what the charges were against him or the evidence upon which they were based, nor was he allowed to confront the defendant Buley, who met with the board privately on June 4, 1968.

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The plaintiff's termination was rescinded in August 1968, and he continued teaching at SCSC during the 1968-69 school year.

Buley made it clear to the board that he would take action not to renew the plaintiff's contract at the end of the 1968-69 school year; and he repeatedly tried to persuade the board of trustees to repeal the clause which gave probationary teachers the right to appeal to the personnel committee decisions terminating them. The minutes of the board state: "It is further the President's wish to dismiss Stolberg after the clause is repealed." Buley's non-renewal of the plaintiff's contract would thus have been unreviewable by the board of trustees. The board of trustees, after considerable deliberation, decided not to repeal the appeal clause in a meeting on December 18, 1968. The minutes of the board indicate that a substantial factor in the decision was:

"fears that the repeal of the appeal clause in the Personnel Policies would cause a first-class faculty uproar; and further that the subsequent dismissal of Stolberg, whether or not the clause were repealed, might cause an uproar on the campus at Southern and in any case would probably get into the courts."

Buley notified the plaintiff on February 27, 1969, that his contract would not be renewed for the next year and thus he would be denied tenure. Buley stated that the decision was that of a newly formed committee at SCSC, of which he was a member and in which administration officials constituted a majority. Despite numerous requests, the plaintiff was given no reasons for the refusal to renew his

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contract. The record shows that he had been recommended for tenure by the chairman of the geography department, as well as by every other faculty member in the department. Testimony at trial by the chairman of the department established that it was highly unusual for a teacher to be denied tenure in the face of such strong recommendation by his department superiors.

The plaintiff again appealed the decision to the personnel committee of the board of trustees. A hearing was held on May 7, 1969, in which the plaintiff was allowed to appear before the committee, although without notice of the charges against him. An observer at the meeting testified that the plaintiff repeatedly asked what were the reasons for his dismissal, if not political; and his questions were met with silence. The defendant Buley appeared before the committee on May 21, 1969; the plaintiff was given no notice of this meeting nor was he allowed to attend. At this time, Buley filed a list of ten "incidents" which were the basis of the plaintiff's dismissal. Since the record shows that Buley had determined far in advance that he was not going to renew the plaintiff's contract, hopefully without the necessity of an appeal, it is unnecessary to dwell at length on these reasons. Most of these "incidents" consisted of speech unrelated to the performance of his duties as a teacher; the most serious was a charge made by a SCSC teacher that the plaintiff had taken two paintings from another SCSC teacher and never returned them. This charge was wholly unsubstantiated. Another "make-weight" charge was that the plaintiff had falsified his original application by not disclosing that he had been prosecuted as a conscientious objector for refus-

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ing to submit to induction in the Army. (His conviction was reversed. *United States v. Stolberg*, 346 F.2d 363 (7th Cir. 1965).) The plaintiff discussed his prosecution with Buley just after his arrival at SCSC in the Fall of 1966, and Buley stated to the board of trustees that he "let the matter drop." This charge had been made against the plaintiff in the 1968 hearing before the personnel committee, and the minutes of the personnel committee meeting of December 18, 1968, state that: "In the absence of evidence more convincing than that presented last year the Committee concluded that it could not support the president (Buley) in dismissing Irving Stolberg." Nonetheless, on June 13, 1969, the plaintiff was notified by the defendant Smith, the secretary of the board of trustees, that the decision to dismiss him was affirmed.

II.

Although a state is under no constitutional compulsion to provide tenure to a teacher, it may not condition a grant of tenure on a limitation of first amendment rights. The two letters which Buley originally cited as reasons for dismissing the plaintiff certainly constitute protected speech within the holding of *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and could provide no basis for dismissal. In *Pickering* the Court held that a teacher was denied first amendment rights when dismissed for writing a letter to a newspaper in which he made remarks highly critical of the "totalitarian" policies of the board of education. The Court stated:

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"(A)bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574.

From the foregoing discussion it is clear, and the court so holds, that the real reason that the plaintiff's contract was not renewed was his exercise of his first amendment rights.³

III.

The plaintiff seeks both equitable and legal relief. Although the standards of culpability for state agents under 42 U.S.C. § 1983 are by no means settled, a persuasive distinction has emerged between the grounds for equitable and legal relief. A deprivation of federally protected rights by a state official justifies equitable relief, notwithstanding a lack of bad motive on the part of the state agent. See, e.g., *Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wis. 1970); *Chase v. Fall Mountain Regional School Dist.*, *supra*, 330 F. Supp. at 400. Accordingly, equitable relief in the instant case is clearly appropriate. The court

³ Although there are serious questions with respect to the adequacy of the procedural due process afforded the plaintiff, cf. *Drown v. Portsmouth School Dist.*, 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); *Chase v. Fall Mountain Regional School Dist.*, 330 F. Supp. 388 (D. N.H. 1971), upon which more light will soon be shed by the Supreme Court, *Roth v. Board of Regents of State Colleges*, 446 F.2d 806, 808 (7th Cir.), *cert. granted*, 404 U.S. 909 (1971), in view of the holding above it is unnecessary to consider these possible procedural deficiencies in this case.

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orders that the plaintiff be reinstated in his faculty position at SCSC, with tenure, beginning with the 1972-73 academic year.

With respect to the question of legal relief by way of monetary damages, there is conflicting authority on the question of whether the common law immunity of state officials provides them with a defense of good faith to an action for damages under § 1983. Compare *Pierson v. Ray*, 386 U.S. 547, 555 (1967), with *Adickes v. Kress & Co.*, 398 U.S. 144, 232-33 (1970) (opinion of Mr. Justice Brennan); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969). See also, *Wall v. Stanly County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967); *Rolfe v. Lincoln County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968).

Assuming, but not deciding, that for decisions made in good faith the imposition of compensatory damages would be barred, the court does not find that the defendants here have established that they acted in good faith. There was testimony by the defendant Smith at trial that he had long believed the board could uphold dismissal of a probationary teacher for no cause whatsoever and had conveyed that view to members of the board. On the other hand, the evidence that the state Attorney General repeatedly cautioned the board that its actions were of quite dubious legality when coupled with the refusal of the board in the 1969 hearing to give the plaintiff any reason for his dismissal, other than his outspoken expression of his political views, suggests that the board was more interested in preserving its own notions of the propriety of faculty participation in public discussions of civil rights issues than in determining whether there were valid reasons relating to the performance of his duties as a teacher why the plaintiff should not continue to be employed.

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Accordingly, the defendants Buley, Creed, Grasso, Richard Gurney, Margaret Gurney, Niejadlik, Wood and Smith, who were shown to have participated in the proceedings against the plaintiff before the personnel committee, are held jointly liable for compensatory damages. The plaintiff has offered uncontroverted testimony that he suffered a salary loss of \$9000.00⁴ because his contract was not renewed and judgment may be entered for the plaintiff for \$9000.00 against the aforementioned defendants.

The plaintiff also seeks damages for "humiliation," pain and suffering, and injury to his reputation. Assuming arguendo that for the loss of his contract as a teacher the measure of damages might encompass items of consequential damages which are not recoverable in an action for breach of contract, his ability to secure another position teaching geography almost immediately and his subsequent election to the Connecticut House of Representatives from the district encompassing SCSC suggests that there was no injury to either his professional or general reputation. There was no medical evidence that the plaintiff had any pain and suffering nor was there any evidence that his reputation in his community was damaged. In any event, therefore, monetary damages for pain, suffering, and damaged reputation would be wholly speculative, and are denied. Cf. *Chase v. Fall Mountain Regional School Dist.*, *supra*, 330 F. Supp. at 400. Although punitive or exemplary damages, including reimbursement for attorney fees in a reasonable amount, have sometimes been awarded under

⁴ This sum represents the difference between what the plaintiff would have earned as a teacher at Quinnipiac (except for a leave of absence to serve in the state legislature in 1971) and what he would have earned at SCSC.

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§ 1983, the court is not of the opinion that such damages are warranted. There may be times when an award of exemplary damages against state officials will be a legitimate coercive measure for securing full compliance with constitutional requirements, but that is not the case here. This case has already had that effect, for during the course of the proceedings the attorney for the defendants stated in open court that the trustees would be willing to offer the plaintiff tenure. Furthermore, the definitive ruling on a point of federal law furnished by this case for their future guidance makes unlikely any repetition of their mistake. Individual redress is the only purpose here. Cf. *Arroyo v. Walsh*, 317 F. Supp. 869, 873 (D. Conn. 1970).

It is urged that decisions such as the one here will have an in terrorem effect on responsible citizens deterring them from performing much-needed duties for public institutions. In the instant case the members of the board of trustees serve voluntarily. The court is keenly aware of this problem, and believes that much of the current lack of judicial agreement over the proper standard of culpability for imposing on state officials the responsibility to pay money damages stems from this very difficulty. Those who act under color of state law carry a heavier burden than those whose acts are merely private; at the same time, to leave those who suffer from a deprivation of federal rights at the hands of state officials without compensation for their losses would deny them the redress which Congress intended they should have by enacting 42 U.S.C. § 1983.

It would seem that a satisfactory solution for this problem would be for the state to bear the burden of financial

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liability which is imposed on state officials who do not act in manifest bad faith in performing their duties. Where state officials, so acting, mistakenly cause losses by depriving a citizen of his civil rights, the state ought to bear the cost; otherwise, as the defendants have urged here, there is a very real danger that public service will be avoided for fear of personal liability. Courts might then award compensatory damages on a simple showing of a deprivation of civil rights, cf. *Adickes v. Kress & Co.*, *supra*, 398 U.S. at 232-33; at the same time they would no longer hesitate to apply the good faith defense to issues of personal liability. Cf. *Whirl v. Kern*, *supra*, 407 F.2d 781.

The foregoing constitutes the court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

IT IS ORDERED:

1. That the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at SCSC for the 1972-73 school year with the same seniority as if his contract had been renewed in 1969; and

2. That the defendants Buley, Creed, Grasso, Richard Gurney, Margaret Gurney, Niejadlik, Wood and Smith pay the sum of \$9000.00 to the plaintiff as damages.

Dated at Hartford, Connecticut, this 29th day of February, 1972.

M. JOSEPH BLUMENFELD

Chief Judge

Judgment

This action came on for trial before the Court, the Honorable M. Joseph Blumenfeld, Chief Judge, United States District Court, presiding, and the issues having been duly tried and a decision having been duly rendered on February 29, 1972,

It is ORDERED and ADJUDGED:

(1) That the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at Southern Connecticut State College for the 1972-1973 academic year with the same seniority as if his contract had been renewed in 1969;

(2) That the plaintiff recover of the defendants Hilton C. Buley, Clark Edwin Creed, Thomas A. Grasso, Richard Gurney, Margaret Gurney, Bernice C. Niejadlik, Alvin V. Wood and J. Eugene Smith the sum of Nine Thousand Dollars (\$9,000.00) as compensatory damages; and

(3) That the plaintiff recover no compensatory damages of the defendants Frank P. Cammarano, Russell Fitz, Ernest A. Johnson, Laura Johnson, James F. McNally, John F. Robinson and Walter Werner.

Judgment

Dated at New Haven, Connecticut, this 7th day of March,
1972.

GILBERT C. EARL

Clerk, United States District Court

By FRANCES J. CONSIGLIO

Deputy in Charge

APPROVED:

M. JOSEPH BLUMENFELD

Chief Judge,

United States District Court

**Verified Application and Petition for Issuance of Order
to Show Cause and for Contempt Judgment**

Now comes the plaintiff in the above entitled action and respectfully applies to this Court, upon the representations and allegations set forth in numbered paragraphs and verified below and upon the annexed affidavits and the exhibits thereto attached, for an order that defendants herein and certain additional persons referred to hereinafter as "respondents" be required to appear and show cause at a hearing before the Court why an order should not be made herein against defendants, attorneys for defendants herein, other respondents, and their agents, employees, and all other persons in active concert and participation with said defendants, attorneys, and other respondents:

- (a) enjoining, restraining, and prohibiting, said persons from acts or omissions or the continuance of acts or omissions in disobedience or resistance to the lawful writ, process, order, rule, decree, or command, of this Court, calculated to impair, defeat, impede, and/or prejudice the rights of plaintiff herein and otherwise calculated to harass plaintiff in connection with his reinstatement to the faculty at Southern Connecticut State College pursuant to the Judgment of this Court;
- (b) enjoining, restraining, and prohibiting, said persons from acts or omissions or the continuance of acts or omissions which cause or permit or are calculated to cause or permit the suspension, termination, or withholding, of salary payments to plaintiff for his

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services as a member of the faculty at Southern Connecticut State College, reinstated with tenure pursuant to the Judgment of this Court;

- (c) adjudging said persons guilty of contempt of this Court and imposing appropriate sanctions until said persons purge themselves of such contempt;
- (d) requiring said persons to pay damages, including payment of all salary payments suspended, terminated, or withheld, for such contempt; and
- (e) ordering such other and further relief, including assessment of attorneys' fees and expenses, as this Court deems just and appropriate in the circumstances;

on the grounds that:

1. This action was commenced by Verified Complaint filed December 15, 1969. Proceedings herein to January 29, 1973, are summarized in the first two paragraphs of the opinion that date of the United States Court of Appeals for the Second Circuit:

"Irving Stolberg, formerly an Assistant Professor of Geography at Southern Connecticut State College ('SCSC'), appeals from a judgment in his favor in his action under the Civil Rights Act, 42 U.S.C. §1983, against the former President of SCSC and members of the Board of Trustees for the State Colleges of Connecticut based on their nonrenewal of his teaching contract and consequent denial of tenure, allegedly in violation of his First Amendment and Due Process

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rights. The district court, M. Joseph Blumenfeld, Chief Judge, sitting without a jury, found defendants' action to have been in retaliation for Stolberg's exercise of his First Amendment rights and awarded him reinstatement with tenure and no loss of seniority and \$9,000 to cover his salary loss. However, he denied additional compensatory damages, punitive damages or attorneys' fees. The court found it unnecessary, in view of its disposition of the First Amendment claims, to decide whether Stolberg had also been denied procedural due process.

"Stolberg here contends that the district court should have decided his due process claims and should have awarded him additional compensatory damages for humiliation, emotional distress and injury to his reputation, plus punitive damages and attorneys' fees. We affirm except as to the denial of attorneys' fees, which we reverse, and we remand for determination and award of reasonable attorneys' fees." *Stolberg v. Members of the Board of Trustees for the State Colleges of the State of Connecticut*, 474 F.2d 485, 486-87 (2d Cir. 1973). (Footnote omitted.)

2. In 1970, after the commencement of this action, and before the pretrial conference and the trial in this action, plaintiff campaigned for election to office as a member of the House of Representatives of the General Assembly of the State of Connecticut and was so elected. Plaintiff commenced serving as a member of said House of Representatives in 1971, and has served continuously as a mem-

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ber of said House of Representatives thereafter. In this action, plaintiff sought, among other relief, reinstatement at Southern Connecticut State College with tenure.

3. In their pretrial memorandum and at the pretrial conference held in this action, defendants sought and were granted leave to amend their answer to allege as an additional affirmative defense the provisions of the so-called "dual job ban," Section 11 of Article Third of the Constitution of the State of Connecticut and Section 2-5 of the Connecticut General Statutes, which defendants then claimed rendered plaintiff ineligible to serve as a member of the General Assembly. Although defendants were granted leave to amend their answer to add such defense, they did not do so. At the close of the trial of this action, held December 2, 7, and 21, 1971, defendants, through respondent Giber, indicated they would not present any defense, stated in open court that they would offer reinstatement with tenure to plaintiff, and made no attempt to raise the issues of the constitutional and statutory provisions referred to above although the prior reference to such provisions was called to the attention of defendants' counsel and the Court. Copies of pertinent portions of defendants' pretrial memorandum herein, the Pretrial Report herein, and the transcript of the trial herein, are annexed hereto as Exhibits A, B, and C.

4. By its Judgment, entered March 7, 1972, this Court ordered, among other relief, that:

"... the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure

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at Southern Connecticut State College for the 1972-1973 academic year with the same seniority as if his contract had been renewed in 1969;"

A copy of said Judgment is annexed hereto as Exhibit D.

5. As noted in paragraph 1, above, plaintiff appealed seeking additional damages and attorneys' fees. For the reasons set forth in its opinion of January 29, 1973, referred to in Paragraph 1, above, the Court of Appeals affirmed in part, reversed in part, remanded for determination of reasonable attorneys' fees, and awarded costs of the appeal to plaintiff-appellant.

6. Defendant Board of Trustees did not promptly offer to reinstate plaintiff with tenure and with the same seniority as if his contract had been renewed in 1969, but, during the pendency of the aforementioned appeal, and thereafter, plaintiff negotiated with defendants directly and through their representatives about his reinstatement. Inasmuch as academic employment at colleges and universities customarily begins at about the early fall at the beginning of an academic year and arrangements for such employment are usually made six or more months in advance; and inasmuch as plaintiff was teaching at Quinnipiac College under various agreements with that College during the period from the fall of 1969 through the spring of 1974; and inasmuch as the particular rank and the salary schedule step at which plaintiff was to return and retirement and other fringe benefits remained to be specified; and

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inasmuch as the amount of attorneys' fees remained to be determined after the decision by the Court of Appeals for the Second Circuit; these matters were the subject of discussions and negotiations between plaintiff and defendants. Ultimately, the amount of the award of attorneys' fees was determined by this Court upon application, and arrangements were made under which plaintiff returned to the faculty at Southern Connecticut State College with tenure at the beginning of the 1974-75 academic year and under which plaintiff was placed on the payroll effective August 28, 1974.

7. Section 4-63, Connecticut General Statutes, provides in pertinent part that:

"... If the auditors of public accounts discover any unauthorized, illegal, irregular or unsafe handling or expenditure of state funds or if it should come to their knowledge that any unauthorized, illegal, irregular or unsafe handling or expenditure of state funds is contemplated but not consummated, they shall forthwith present the facts to the governor and joint committee on legislative management...."

8. On or about October 7, 1974, respondents Leo B. Donohue and Henry J. Becker, Jr., Auditors of Public Accounts of the State of Connecticut, sent letters to the Legislative Management Committee and to the Governor of the State of Connecticut referring to the fact that plaintiff was placed on the Southern Connecticut State College payroll effective August 28, 1974, and stating that:

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"... Mr. Stolberg was reinstated to a faculty position following a ruling by the United States District Court."

"Under the provisions of Article 3, Section 11 of the State Constitution no member of the General Assembly shall, during the term for which he is elected, hold any appointive position in the Executive Branch of the State Government. Mr. Stolberg's appointment to the faculty at Southern Connecticut State College, in our opinion, is in violation of the State Constitution."

"This is reported to you as required under Section 4-63 of the General Statutes."

A copy of the letter dated October 7, 1974, from the Auditors of Public Accounts to the Legislative Management Committee, is annexed as Exhibit E.

9. Upon information and belief, the Joint Committee on Legislative Management has taken no action upon the report of the Auditors of Public Accounts.

10. Upon information and belief, respondent Honorable Thomas J. Meskill, Governor of the State of Connecticut, by letter dated October 8, 1974, wrote to the Board of Trustees for the State Colleges of the State of Connecticut concerning plaintiff's position, and by letter dated October 17, 1974, Mrs. Bernice C. Niejadlik, Chairman of the Board of Trustees, replied to Governor Meskill and stated:

"... As noted by the State Auditors in their letter of October 7, the Trustees were required by the United States District Court to return Mr. Stolberg to the

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faculty of Southern Connecticut State College. At the time the Court made its ruling Mr. Stolberg was a member of the General Assembly. In view of these facts the Trustees believe it would be inappropriate for them to raise any questions with Mr. Stolberg concerning his position on the faculty."

A copy of that letter is annexed as Exhibit F.

11. Under date of October 28, 1974, respondent Honorable Robert K. Killian, Attorney General of the State of Connecticut, by respondent Sidney D. Giber, Assistant Attorney General, issued a letter of opinion to respondent Honorable Nathan G. Agostinelli, Comptroller of the State of Connecticut, containing the following conclusion:

"... [W]e conclude that the effect of the decision of the United States District Court was to restore Irving Stolberg to his position and rank of assistant professor as of 1969 and that in January, 1971, when Stolberg became a member of the General Assembly he surrendered his position at Southern Connecticut State College and that during the term for which he is elected Irving Stolberg cannot hold the position of assistant professor at Southern Connecticut State College."

A copy of said letter of opinion is attached as Exhibit G.

12. Previously, under date of February 19, 1974, respondent Honorable Robert K. Killian, Attorney General of the State of Connecticut, by respondent Sidney D. Giber, Assistant Attorney General, wrote to plaintiff, through

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his counsel, in connection with the negotiations referred to in paragraph 6, above, having to do with the time when plaintiff was to be reinstated, the determination of attorneys' fees, and the rank at which plaintiff was to be reinstated, as follows:

"I am personally pleased at Professor Stolberg's decision to return to Southern Connecticut State College for the 1974-1975 school year. Would you please set down both the matters of Professor Stolberg's promotion and the amount of attorney fees on Judge Blumenfeld's calendar. . ."

A copy of said letter is attached as Exhibit H.

13. By letter dated October 8, 1974, plaintiff advised respondent Governor Meskill of plaintiff's view that his position at Southern Connecticut State College was neither a part of the Judicial Department nor a part of the Executive Department of the government of the State of Connecticut; plaintiff further indicated his view that defendants and respondents were bound by the Judgment of the United States District Court and requested an opportunity "to clarify this situation and present further supporting evidence to the appropriate state agency or authority." By letter dated November 7, 1974, respondent Governor Meskill advised plaintiff that it was not within the province of the Governor to determine whether the constitutional "dual job ban" applied to faculty members in Connecticut's system of higher education, that he had been informed that the Attorney General's Office had re-

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cently issued an advisory opinion on plaintiff's situation which he regarded as dispositive of the matter, and that, as a consequence, he was not in a position to provide plaintiff with any hearing.

14. By letter dated November 12, 1974, the undersigned attorney for plaintiff wrote to the Office of the Attorney General, and on the following day met with Messrs. Ahern and Giber of that office to deliver said letter and to discuss the situation. On behalf of plaintiff, the attention of the Office of the Attorney General was called to the effect of the Judgment of this Court in this action, to the powers of the Board of Trustees under state law, and to the fact that if said Board of Trustees were not part of the Executive Department of the State Government, there was no violation, while if they were part of that Department there were disparate views within said Department which the Governor, in whom the supreme executive power of the state is vested under Section 5, Article Fourth, of the State Constitution, had not resolved. On behalf of plaintiff, it was requested that the Governor, the State Comptroller, and the Board of Trustees for the State Colleges, be advised of these views, or, if it were considered inappropriate for the Office of the Attorney General to transmit them, that the plaintiff be so advised so that he could confer directly with such state officers. A copy of that letter is annexed as Exhibit "I."

15. Respondent Attorney General Killian, by respondent Giber, replied by letter dated November 18, 1974, and advised plaintiff that they would not alter their opinion

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as expressed to the State Comptroller on October 28, 1974, that they did not deem it appropriate to forward plaintiff's letter of November 12, 1974, to the Governor, the State Comptroller, or the Board of Trustees for the State Colleges, and that they deemed it inappropriate for plaintiff to communicate directly with such persons. A copy of that letter is attached as Exhibit J.

16. By letter dated November 21, 1974, Manson Van B. Jennings, President of Southern Connecticut State College, advised plaintiff that his salary check dated November 22, 1974, was being withheld, and that he had been advised by a member of the staff of respondent Comptroller Agostinelli that such action was based upon advice of the Attorney General's Office. A copy of that letter is annexed as Exhibit K.

17. Salary checks for faculty members at Southern Connecticut State College are customarily available to be picked up by the faculty member on alternate Fridays. Plaintiff has not received his salary checks that he would normally have obtained on November 22 and on December 6, although plaintiff has served and continues to serve since the beginning of this academic year as a member of the faculty at Southern Connecticut State College and continues to hold his appointment as a faculty member there. Upon information and belief, none of defendant trustees, nor any of their agents, has acted to cause resumption of payment of the withheld salary payments although said defendants have taken no steps otherwise to terminate or vitiate plaintiff's reinstatement to the faculty

*Verified Application and Petition for Issuance of Order
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at Southern Connecticut State College with tenure pursuant to the judgment of this Court.

18. Section 10-109b, Connecticut General Statutes, which specifies the powers and duties of the members of the Board of Trustees for the State Colleges provides in pertinent part:

" . . . The board may appoint or remove the chief executive officer of each institution within its jurisdiction, and with respect to its own operation the board of trustees may appoint and remove an executive secretary and executive staff. The board may determine the size of the executive staff and the duties, terms and conditions of employment of said secretary and staff, subject to the approval of the commission. The board of trustees may employ faculty and other personnel needed to maintain and operate the institutions within its jurisdiction. Within the limitation of appropriations, the Board shall fix the compensation of such personnel, establish terms and conditions of employment and prescribe their duties and qualifications. Said Board shall determine who constitutes its professional staff and establish compensation and classification schedules for its professional staff. . . . "

19. Section 3-119, Connecticut General Statutes, which relates to the payment of salaries by the State Comptroller, provides in pertinent part:

*Verified Application and Petition for Issuance of Order
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"The comptroller shall pay all salaries and wages not less than ten days nor more than fifteen days after the close of the payroll period in which the services were rendered, but shall draw no order in payment for any service of which the payroll officer of the state has official knowledge without the signed statement of the latter that all employees listed on the payroll of each agency have been duly appointed to authorized positions and have rendered the services for which payment is to be made . . ."

20. Upon information and belief, respondent William R. Brooks, a member of the staff of the State Comptroller designated as Payroll Officer, Central Payroll Division, acted to suspend, terminate, and withhold, delivery of plaintiff's salary payment checks as stated in the letter, a copy of which is annexed as Exhibit K.

21. Plaintiff's most recent regular salary check delivered to him was in the amount of \$517.57 and represented a gross cash salary payment of \$696.83 less the following deductions:

| <i>Item</i> | <i>Amount</i> |
|------------------------------------|---------------|
| Withholding Tax | \$105.15 |
| Retirement Fund Contribution | 13.94 |
| FICA Contribution | 40.76 |
| Group Life Insurance Payment | 4.50 |
| Major Medical Insurance | 14.90 |
| | <hr/> |
| | \$179.26 |

*Verified Application and Petition for Issuance of Order
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Plaintiff relies mainly on such salary payments for the support of himself and his wife and child, and the termination of such payment threatens insurance coverage and other rights provided for by deductions for himself and his family.

22. Plaintiff made inquiry in April of 1972 with a view to being reinstated with tenure on the faculty at Southern Connecticut State College. As far as plaintiff knows, defendants did not purport to offer reinstatement until June of 1972, by a letter directed to plaintiff which plaintiff never received, by which time plaintiff had already contracted to continue teaching at Quinnipiac College during the following academic year. Efforts to obtain reinstatement for the academic year 1973-1974 led to delays and questions by the Attorney General's Office which made it impossible for plaintiff to return before the beginning of the 1974-1975 academic year, and defendants and their attorneys agreed to such reinstatement pursuant to the Judgment of this Court.

23. Defendants and respondents have acted to disobey, resist, and/or interfere with or prevent compliance with, the order contained in the Judgment of this Court in this action.

24. The acts and omissions of defendants and respondents alleged hereinabove are and have been calculated to impair, defeat, impede, and prejudice, and have so impaired, defeated, impeded, and prejudiced, the rights of the

*Verified Application and Petition for Issuance of Order
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plaintiff, in that although this Court ordered in its Judgment that plaintiff be reinstated at Southern Connecticut State College and abandoned any further attempts with tenure, and in that although defendants sought and were given the opportunity to determine the rights of plaintiff to be reinstated in the light of the constitutional and statutory provisions of the State of Connecticut referred to above, defendants did not take further steps to have those questions adjudicated herein, but defendants and respondents have caused or permitted plaintiff to be reinstated at Southern Connecticut State College and shortly thereafter have caused or permitted the suspension, termination, and withholding, of plaintiff's salary payments on grounds which they sought to and were permitted to raise in this action before trial and judgment, and then failed to raise, allowing judgment ordering such reinstatement with tenure.

25. Respondents Giber and Killian were at all pertinent times attorneys for defendants herein.

WHEREFORE, plaintiff applies to and petitions this Court for an Order to Show Cause in the form annexed requiring said defendants and respondents specified therein to answer and show cause why they should not be adjudged in contempt of this Court and, upon return and due hearing upon said Order to Show Cause, to enter an Order and Judgment in the form annexed adjudging defendants and respondents in contempt of this Court for having caused, permitted, and disregarded, disobedience of and resistance to the Judgment of this Court and further ordering that

*Verified Application and Petition for Issuance of Order
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defendants and respondents purge themselves of said contempt by paying to plaintiff of the sums therein specified, together with all costs of this proceeding, including reasonable attorneys' fees, and by ordering that defendants and respondents be enjoined and restrained from resistance to or interference with plaintiff's continued service on the faculty of Southern Connecticut State College with tenure.

PLAINTIFF IRVING STOLBERG

By /s/ LOUIS M. WINER

Louis M. Winer

TYLER, COOPER, GRANT,

BOWERMAN & KEEFE

P. O. Box 1936

20¹/₂ Church Street

New Haven, Conn. 06509

Attorneys for Plaintiff

Dated: December 12, 1974.

VERIFICATION

New Haven, December 12, 1974.

STATE OF CONNECTICUT,
COUNTY OF NEW HAVEN, ss.:

IRVING STOLBERG, of the Town of New Haven, having been duly sworn, does depose and say: that he has read the foregoing Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, that he knows the contents thereof, and that the statements contained therein are true and correct of his own knowledge or, where so indicated, to the best of his information and belief.

/s/ IRVING STOLBERG
Irving Stolberg

Sworn to and subscribed before me this 12th day of December, 1974.

/s/ ARNOLD R. CHRISTIANSEN
Arnold R. Christiansen
Notary Public

EXHIBIT C ANNEXED TO VERIFIED
APPLICATION AND PETITION

[PAGES 169 THROUGH 173 OF TRANSCRIPT OF PROCEEDINGS AT
THE CLOSE OF TRIAL HEREIN, DECEMBER 21, 1971]

[169] The Court: Well, there isn't any need to tie in so much testimony now if the defendants takes the position that it is willing to grant tenure, is that correct?

Mr. Giber: It is willing to grant tenure. He has never been denied tenure, might be one way to state it.

Mr. Winer: That's an astonishing statement.

Mr. Giber: That was one of his grounds for relief.

No, I guess we are willing to grant tenure immediately. The board will meet and he will be granted tenure.

The Court: All right.

Mr. Winer: If your Honor please, there is a question as to what period of time he can come back. The earliest he can possibly come back is next fall and that, of course, causes him great—

The Court: All right. But I mean the point is we are now talking about any damages he may have sustained.

As far as relief goes, in order to grant tenure, it has to be considered in light of the fact that there is a statement in open Court that tenure will be granted at any time. That has to do with [170] whether or not the Court should exercise the power by imposing an order to that effect.

I suppose it also has a little significance possibly as an admission that the denial or refusal or hesitancy or delay in granting tenure at an early time was not proper.

But it seems to me then the only question which remains is that of damages.

Exhibit C Annexed to Verified Application and Petition

I think see no reason why the submission which you propose to offer the Court to assist the Court in the way of a finding of facts and conclusions should not be limited accordingly.

Mr. Winer: It has to do with the basis for the various claims of damages.

Could we take a brief recess, your Honor?

The Court: Well, I think we are all done. What do you want a recess for? What more do we have to do?

Mr. Winer: Well, I would like an opportunity to make a submission of these various items. They do have to do with damages.

The Court: What submission are you talking about? Something that is not yet in the record?

Mr. Winer: Yes, your Honor.

The Court: What is it?

[171] Mr. Winer: Interrogatories, six documents and an affidavit as to the attorney's fees.

The Court: Those may be presented to the Court by—

Mr. Winer: A stipulation?

The Court: By stipulation. Or if they have to do with interrogatories, or requests for admission and admissions have not been made those requests may be taken as having been admitted.

Mr. Winer: Well, may we simply have a date for the submission of briefs?

The Court: Yes. What do you want?

Mr. Winer: Would the Court prefer cross briefs or briefs in sequence?

The Court: I think a brief by the plaintiff and a response by the defendant; and you can, if you find a reply brief is necessary, file one.

Exhibit C Annexed to Verified Application and Petition

How long do you want, Mr. Winer?

Mr. Winer: If we may, the middle of next week; next Wednesday.

The Court: You can have more time than that. It's up to you, of course. You may be fully prepared to knock out a brief in a hurry.

When do you want it?

Mr. Winer: Wednesday. That would be the 29th.

[172] The Court: The 29th.

You can get a brief out, in response, a week later?

Mr. Giber: I hope so, your Honor. I'll try. I believe we can.

The Court: And plaintiff's reply brief another week?

Mr. Winer: Another week, yes, your Honor.

The Court: All right.

Now, Mr. Giber made the statement that the defendant is willing to grant tenure.

Mr. Giber: Yes sir.

The Court: At any time.

Now, I don't know that at any time means forever and ever on into the future.

Mr. Giber: Excuse me, your Honor. I meant that the board is willing at this moment to meet and grant him tenure. We're figuring at, let's say, such time as the Court may direct.

The board met last week and offered tenure.

The Court: The board?

Mr. Giber: The Board of Trustees authorized me last week to offer tenure.

The Court: Very well. So you understand that.

Mr. Winer: Yes, your Honor.

Exhibit C Annexed to Verified Application and Petition

[173] The Court: Okay.

Mr. Winer: If your Honor please, I believe our complaint would be more specific and a better complaint if two paragraphs were added to conform to the evidence here. And I would simply like to file with the Court a motion to amend the complaint to conform with the evidence.

I call the Court's attention and Mr. Giber's attention to the fact that the defendant hasn't filed a defense about the question of office holding while on the faculty. That was to be filed, but has never been filed.

The Court: What?

Mr. Winer: There was to have been a defense filed by the defendant having to do with the plaintiff's position in the legislature and that was never filed.

The Court: So it's not in the case. A dual job ban might affect the right to tenure?

Mr. Winer: It might affect his right to return.

Well, I withdraw the comment.

The Court: All right.

Adjourn Court.

(Whereupon, Court was adjourned.)

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EXHIBIT E ANNEXED TO VERIFIED
APPLICATION AND PETITION

[LETTER DATED OCTOBER 7, 1974, FROM LEO V. DONOHUE
AND HENRY J. BECKER, JR., AUDITORS OF PUBLIC ACCOUNTS
OF THE STATE OF CONNECTICUT, TO LEGISLATIVE MANAGE-
MENT COMMITTEE]

STATE OF CONNECTICUT
(Emblem)

AUDITORS OF PUBLIC ACCOUNTS
STATE CAPITOL
HARTFORD

LEO V. DONOHUE

HENRY J. BECKER, JR.

October 7, 1974

Legislative Management Committee
Room 314
State Capitol
Hartford, Connecticut

Attention: Mr. David Ogle, Executive Director

Dear Mr. Ogle:

It has been brought to our attention by our Payroll Audit staff that State Representative Irving J. Stolberg was added to the Southern Connecticut State College payroll effective August 28, 1974. Mr. Stolberg was reinstated to a faculty position following a ruling by the United States District Court.

Exhibit E Annexed to Verified Application and Petition

Under the provisions of Article 3, Section 11 of the State Constitution no member of the General Assembly shall, during the term for which he is elected, hold any appointive position in the Executive Branch of the State government. Mr. Stolberg's appointment to the faculty at Southern Connecticut State College, in our opinion, is in violation of the State Constitution.

This is reported to you as required under Section 4-63 of the General Statutes.

Very truly yours,

AUDITORS OF PUBLIC ACCOUNTS

/s/ LEO V. DONOHUE

/s/ HENRY J. BECKER, JR.

LVD;HJB:roc

EXHIBIT F ANNEXED TO VERIFIED
APPLICATION AND PETITION

[LETTER DATED OCTOBER 17, 1974, FROM BERNICE C. NIEJAD-
LIK, CHAIRMAN, BOARD OF TRUSTEES FOR THE STATE COL-
LEGES OF THE STATE OF CONNECTICUT, TO HON. THOMAS J.
MESKILL, GOVERNOR OF CONNECTICUT]

(Emblem)

STATE OF CONNECTICUT
BOARD OF TRUSTEES
FOR THE STATE COLLEGES

1280 ASYLUM AVENUE

HARTFORD, CONNECTICUT 06105

October 17, 1974

The Honorable Thomas J. Meskill
Governor of Connecticut
Executive Chambers
State Capitol
Hartford, Connecticut

My dear Governor Meskill:

Reference is made to your letter of October 8 concerning Mr. Irving Stolberg. As noted by the State Auditors in the letter of October 7, the Trustees were required by the United States District Court to return Mr. Stolberg to the faculty of the Southern Connecticut State College. At the time the Court made its ruling Mr. Stolberg was a member of the General Assembly. In view of these facts the Trustees believe it would be inappropriate for them to raise any

Exhibit F Annexed to Verified Application and Petition

questions with Mr. Stolberg concerning his position on the faculty.

The question of Mr. Stolberg's membership in the General Assembly would seem to be outside the jurisdiction of the Trustees. We note that Article Third, Section 7, of the Constitution of the State of Connecticut declares: "Each house shall be the final judge of the election returns and the qualifications of its own members." Whether this is a matter appropriately left to the House of Representatives or to some other agency appears to be a question more properly left to the Governor of Connecticut than to the Board of Trustees.

Sincerely,

/s/ BERNICE C. NIEJADLIK
Bernice C. Niejadlik
Chairman

BCN.gch

cc: Mr. H. Becker
Mr. L. Donohue
President M. Jennings
The Hon. I. Stolberg
Dr. J. Frost

EXHIBIT G ANNEXED TO VERIFIED
APPLICATION AND PETITION

[LETTER DATED OCTOBER 28, 1974, FROM ROBERT K. KILLIAN,
ATTORNEY GENERAL OF THE STATE OF CONNECTICUT, BY
SIDNEY D. GIBER, ASSISTANT ATTORNEY GENERAL, TO HON.
NATHAN G. AGOSTINELLI, STATE COMPTROLLER]

STATE OF CONNECTICUT
(Emblem)

OFFICE OF THE ATTORNEY GENERAL
30 TRINITY STREET
HARTFORD 06115

ROBERT K. KILLIAN
Attorney General

Tel: 566-4990

October 28, 1974

Honorable Nathan G. Agostinelli
State Comptroller
30 Trinity Street
Hartford, Connecticut 06115

Dear Mr. Agostinelli:

By letter dated October 15, 1974 you related that the Auditors of Public Accounts had informed you that they believe that the appointment of State Representative Irving Stolberg to the faculty of Southern Connecticut State College is in violation of Article III, Section 11 of the Connecticut Constitution. You sought our advice because the office of

Exhibit G Annexed to Verified Application and Petition

the Comptroller processes payments for the faculty at Southern Connecticut State College and you do not wish to make unauthorized payments.

Irving Stolberg, then an assistant professor, was dismissed from the faculty of Southern Connecticut State College in June, 1969. He thereafter instituted an action against the Board of Trustees for the State Colleges in the United States District Court alleging that he had been discharged for constitutionally impermissible reasons. Subsequently, Irving Stolberg was elected to the State Legislature. In March, 1972, M. Joseph Blumenfeld, Chief Judge, United States District Court for the District of Connecticut, rendered judgment in favor of Irving Stolberg and ordered, inter alia, "That the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at Southern Connecticut State College for the 1972-1973 academic year with the same seniority as if his contract had been renewed in 1969." Appeals were taken to the United States Court of Appeals. The matter has now been adjudicated, the compensatory damages have been paid and in compliance with the court order the Board of Trustees offered to reinstate Irving Stolberg with the same seniority as if his contract had been renewed in 1969.

Without formally resigning as a member of the General Assembly, Irving Stolberg accepted the offer of reinstatement. Prior to accepting reinstatement Stolberg made a demand that his reinstatement be with a promotion to the rank of associate professor; however, he accepted reinstatement at the rank of assistant professor. Since then, on

Exhibit G Annexed to Verified Application and Petition

stationery captioned "Irv Stolberg, state representative" he has written to Mrs. Niejadlik, chairman of the Board of Trustees for the State Colleges and stated, "I must suggest that the letter and the spirit of the federal court decisions, in our opinion, require reinstatement by the Board of Trustees at the rank of Associate Professor . . . if your decision is not affirmative on the matter of rank I would request a meeting with the full Board in order to present the case and supporting evidence."

After being notified of the findings of the Auditors of Public Accounts on stationery indicating that he is a member of the General Assembly he has written to the Governor and to the Auditors of Public Accounts claiming that the State system of higher education constitutes a fourth and separate branch of the State government and therefore he is not subject to the dual job ban of Article III, Section 11 of the State Constitution.

The above-cited letters serve to underscore the wisdom of our constitutional and statutory dual job bans.

On February 9, 1971 we rendered an opinion which is dispositive of the questions raised concerning Irving Stolberg. The following is the text of our earlier opinion addressed to the president of Eastern Connecticut State College.

"By your letter of December 8, 1970, you advised that a Senator elected to the 1971 General Assembly will be employed to teach on a part-time basis at Eastern Connecticut State College during the 1971 Spring Semester. You

Exhibit G Annexed to Verified Application and Petition

requested that the Attorney General advise you whether such employment would be contrary to law by reason of the dual status of the Senator as a legislator and as a State employee. You are advised that such employment is contrary to law for the reasons that follow.

"The Constitution of Connecticut adopted in 1965 states in Article III, Section 11, 'No member of the general assembly shall, during the term for which he is elected, hold or accept any appointive position or office in the judicial or executive department of the state government, or in the courts of the political subdivisions of the state, or in the government of any county . . .'

"The General Statutes provide in Section 2-5 that 'No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly or any other appointing authority of this State to any position in the judicial, legislative or executive department of the state government, except as provided in this section . . .'

"The references to an appointment in both the statute and the constitution are consistent with Chapter 67 of the General Statutes, the State Personnel Act, which treats an appointment as any designation for an office that does not come about by a general election by the voters. Within the context of this chapter an appointing authority is a board, commission, officer, commissioner, person or group of persons having the power to make appointments by virtue of a statute or by lawfully delegated authority. [Section 5-196(c)]. Such an appointment occurred when the sub-

Exhibit G Annexed to Verified Application and Petition

ject legislator was employed as a part-time member of your professional staff under the authority delegated to the Board of Trustees of Eastern Connecticut State College. [Section 10-329(a); Section 5-198(1); Section 5-196(y)]. The Facts recited by you are also consistent with this interpretation under other definitions set forth in the State Personnel Act. [Section 5-196(i), (k), (p), (t) and (w)].

"The reference to Section 10-109b in the enclosures sent with your inquiry has prompted careful re-reading of that statute which describes the duties of state college trustees. In Section 10-109b the General Assembly used the word 'appointing' in a manner that conforms to the definitions set forth in the State Personnel Act by the draftsman's mutual substitution of terms. While the statute does refer to the power of the board to appoint and remove the chief executive officer, executive secretary and executive staff of the institution, it immediately thereafter refers to the duties, terms and conditions of employment of the secretary and staff. This indicates an intention that these 'appointees' be treated as state employees for purposes of the Act.

"It is more significant, however, that the General Assembly expressly set up in Sections 5-196 and 5-198 a distinction between classified and unclassified service that encompasses every office or position in the state service, and makes an explicit reference to persons employed in teaching positions at state institutions. [Section 5-196(e), (i), (w), (y) and Section 5-198(1)].

"There was no intention indicated in the text of Section 10-109b to create any exception to the State Personnel Act,

Exhibit G Annexed to Verified Application and Petition

since none was either explicitly stated or clearly implied by this statute. This is relevant because the State Personnel Act was adopted in its present form in 1967 and was extended in the General Assembly Session of 1969. Section 10-109b was first adopted in 1965 and was later amended and extended in 1967 and 1969. In short, the work of the General Assembly on both of these statutes has been concurrent and recent. If the Legislators or the drafters of the 1965 Constitution had intended to set up a separate and unique class of State Legislators or public employee to fit the circumstances described in your letter, it cannot be questioned that they would have been aware of all of the statutes, circumstances and relationships indicated by your letter and enclosures. [30 Op. A.G. 99, 100; 82 C.J.S. 634-635 at §327, fn. 86].

"In your letter to the Attorney General and enclosures you have made a reference to the purpose of the constitutional provision [Article III, Section 11] and the General Statute. [Section 2-5]. These provisions of the Connecticut Constitution and the General Statutes have primary objective of establishing and preserving the separation and independence of the executive and judicial branches of the State government from the legislative branch. While the loss of the services of a teacher who is employed at a State institution of learning must be regretted, the maintenance of that separation of powers is fundamental to the checks and balances that underlie our constitutional system of government in Connecticut. [16 C.J.S. pp. 483-486, §104, see especially fn. 5 and 6 on p. 484]."

Exhibit G Annexed to Verified Application and Petition

Having determined that Irving Stolberg is subject to the prohibitions of the dual job ban, the sole question remaining to be determined is whether he is now a member of the General Assembly or an assistant professor employed by Southern Connecticut State College.

The Connecticut Supreme Court, in ruling on this type of question, in *State ex rel. Butera v. Lombardi*, 146 Conn. 299, 303, opined:

"Where the holding of two offices by the same person, at the same time, is forbidden by the constitution or a statute, the effect is the same as in the case of holding incompatible offices at common law. In such case, the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal; it is made so in one case by the policy of the law, and in the other by absolute law. In either case the law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied." *State ex rel. Walker v. Bus*, 135 Mo. 325, 330, 36 S.W. 636. Cases illustrative of the application of this principle of implied surrender of the first office where, by a constitutional or statutory provision, the holding of more than one office is expressly forbidden are: *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 638, 141 So. 553; *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286; *Chambers v. State ex rel. Barnard*, 127 Ind. 365, 26 N.E. 893; *Lilly v. Jones*, 158 Md. 260, 271, 148 A. 434; *People ex rel. Henry v. No-*

Exhibit G Annexed to Verified Application and Petition

strand, 46 N.Y. 375, 381; *State ex rel. McIntosh v. Long*, 186 N.C. 516, 518, 120 S.E. 87; *Darling v. Brunson*, 94 S.C. 207, 210, 77 S.E. 860; *State ex rel. v. Beveridge*, 88 Ore. 334, 336, 171 P. 1173; *Caldwell v. Lyon*, 168 Tenn. 607, 612, 80 S.W.2d 80; *Shell v. Cousins*, 77 Va. 328, 332.

Applying the principle set forth in *State ex rel. Butera v. Lombardi*, supra, we conclude that the effect of the decision of the United States District Court was to restore Irving Stolberg to his position and rank of assistant professor as of 1969 and that in January, 1971, when Stolberg became a member of the General Assembly he surrendered his position at Southern Connecticut State College and that during the term for which he is elected Irving Stolberg cannot hold the position of assistant professor at Southern Connecticut State College.

Very truly yours,

ROBERT K. KILLIAN
Attorney General

By /s/ SIDNEY D. GIBER
Sidney D. Giber

Assistant Attorney General

SDG:R

EXHIBIT H ANNEXED TO VERIFIED
APPLICATION AND PETITION

[LETTER DATED FEBRUARY 19, 1974, FROM ROBERT K. KILLIAN,
ATTORNEY GENERAL OF THE STATE OF CONNECTICUT, BY
SIDNEY D. GIBER, ASSISTANT ATTORNEY GENERAL, TO
LOUIS M. WINER]

STATE OF CONNECTICUT
[Emblem]

ATTORNEY GENERAL'S OFFICE
30 TRINITY STREET
HARTFORD

ROBERT K. KILLIAN
ATTORNEY GENERAL

February 19, 1974

Louis M. Winer, Esq.
Tyler, Cooper, Grant, Bowerman
& Keefe, Esqs.
P. O. Box 1936
205 Church Street
New Haven, Connecticut 06509

Re: *Stolberg v. Members of the Board of Trustees*

Dear Lou:

In reply to your letter of February 6, 1974, I apologize
for not having been able to answer your letter sooner, but I
have been on trial continually for several weeks. My vaca-

Exhibit H Annexed to Verified Application and Petition

tion was supposed to start on February 6, 1974, and I have been unable to take it because of the extreme pressures of my trial load.

I am personally pleased at Professor Stolberg's decision to return to Southern Connecticut State College for the 1974-1975 school year. Will you please set down both the matters of Professor Stolberg's promotion and the amount of attorney fees on Judge Blumenfeld's calendar. The check for \$25,000 that I tendered last June is now out of date.

Very truly yours,

ROBERT K. KILLIAN
Attorney General

By /s/ SIDNEY D. GIBER
Sidney D. Giber
Assistant Attorney General

SDG:LMW

EXHIBIT I ANNEXED TO VERIFIED
APPLICATION AND PETITION

[LETTER DATED NOVEMBER 12, 1974, FROM LOUIS M. WINER,
TO OFFICE OF THE ATTORNEY GENERAL, ATTENTION: F.
MICHAEL AHERN, ESQUIRE, SIDNEY D. GIBER, ESQUIRE, AS-
SISTANT ATTORNEYS GENERAL]

November 12, 1974

Office of the Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Attention: F. Michael Ahern, Esquire,
Sidney D. Giber, Esquire,
Assistant Attorneys General

Re: Stolberg v. Members of the Board of Trustees, etc.,
Civil Action No. 13591,
United States District Court
for the District of Connecticut.

Gentlemen:

We have a copy of your letter dated October 28, 1974, addressed to Honorable Nathan G. Agostinelli, State Comptroller, the first paragraph of which states:

"By letter dated October 15, 1974 you related that the Auditors of Public Accounts had informed you that they believe that the appointment of State Representative Irving Stolberg to the faculty of Southern Connecticut State College is in violation of Article III,

Exhibit I Annexed to Verified Application and Petition

Section 11 of the Connecticut Constitution. You sought our advice because the office of the Comptroller processes payments for the faculty at Southern Connecticut State College and you do not wish to make unauthorized payments."

We represent Mr. Stolberg in connection with this matter and have represented him in connection with the above-entitled federal action.

We do not have any direct communication from the State Comptroller, and we request that you place this letter and the enclosures before him and advise us as soon as you can what action the State Comptroller proposes to take.

Before commenting on any of the matters set out in the opinion letter of your Office in the above letter to the State Comptroller, we wish to raise three matters which, in our view, were either not considered at all or were not adequately considered in that letter.

In connection with the first matter, we submit with this letter:

- (1) a copy of the first, fourth, and fifth pages of Defendants' Pretrial Memorandum, filed May 6, 1971, by the Attorney General on behalf of defendants in the above action who were represented by your Office;
- (2) a copy of the first two pages of the Pretrial Report of the Pretrial Conference in the above action held April 22, 1971, at Hartford, and filed May 10, 1971;

Exhibit I Annexed to Verified Application and Petition

- (3) a copy of pages 172 and 173 of the transcript of the trial in the above action, taken at the close of the trial of that action on December 21, 1971; and
- (4) a copy of a letter dated October 17, 1974, from Mrs. Bernice C. Niejadlik, Chairman of the Board of Trustees for the State Colleges of the State of Connecticut, to The Honorable Thomas J. Meskill, Governor of Connecticut.

It is plain from these documents that at the time of the trial of the above action in 1971, and before that, the defendants in that action and your Office were aware of the possibility of raising the issue of the "dual job ban" in that action, were given permission to raise it, and abandoned that issue in the pleadings and at the trial. It is also clear that the "dual job ban" was not only an issue that could have been raised at that trial but was an issue that defendants in that action and your Office sought to raise, were given permission to raise, and subsequently abandoned before the close of the trial and before judgment. As we view it, and as the Board of Trustees apparently views the matter in the light of Chairman Niejadlik's letter of October 17, 1974, to Governor Meskill:

"... [T]he Trustees were required by the United States District Court to return Mr. Stolberg to the faculty of the Southern Connecticut State College. At the time the Court made its ruling Mr. Stolberg was a member of the General Assembly. In view of these facts the Trustees believe it would be inappropriate for them to raise any questions with Mr. Stolberg concerning his position on the faculty."

Exhibit I Annexed to Verified Application and Petition

In this connection, we mention the well-established principles that even if the position of your Office as to the applicability of the "dual job ban" were correct, and in our opinion it is not, the District Court's judgment and orders must be given effect, even if compliance with these orders were to involve a violation of the "dual job ban", except insofar as available orderly and proper judicial proceedings may be pursued to appeal from or otherwise attempt to reverse the District Court's order. Attempts to vitiate, resist, or interfere with, the District Court's judgment and orders can be made only at the peril of being found in contempt of the Court's authority.

United States v. United Mine Workers of America,
330 U.S. 258, 293-94, 91 L.Ed. 884, 912-13, 67
S.Ct. 677 (1947);

Land v. Dollar, 190 F.2d 623, 623-35, 638-48 (D.C.
Cir. 1951), *vacated as moot sub nom. Sawyer*
v. Dollar, 344 U.S. 806-807, 97 L.Ed. 628, 73
S.Ct. 7 (1952);

United States v. Goldfarb, 167 F.2d 735 (2d Cir.
1948);

Bigelow v. RKO Radio Pictures, 78 F.Supp. 250
(N.D. Ill. 1948);

Parker v. United States, 126 F.2d 370 (1st Cir.
1942);

In re Noyes, 121 Fed. 209, 223 (9th Cir. 1902).

The second matter to which we wish to call your attention has to do with the appropriate action to be taken by the

Exhibit I Annexed to Verified Application and Petition

Auditors of Public Accounts in rendering reports and the appropriate action to be taken upon such reports pursuant to applicable constitutional and statutory provisions. First, the duties of the Auditors of Public Accounts are established by Section 4-63, Connecticut General Statutes. That statutory provision requires that upon discovery of past or contemplated unauthorized, illegal, irregular, or unsafe handling or expenditure of state funds, the Auditors "... shall forthwith present the facts to the Governor and joint committee on legislative management. . . ." Chapter 49 does not appear to specify what actions are required to be taken by the Governor or by the joint committee on legislative management upon such a report. The normal and reasonable interpretation of the provision would, however, appear to be that whatever action is to be taken upon such a report would be taken by the Governor or the joint committee on legislative management, to whom such a report is required to be presented. By this letter, we request an opportunity to present to the Governor and to the Joint Committee on Legislative Management such facts and authority as may be appropriate to put before them the full circumstances of this matter before either the Governor or the Joint Committee on Legislative Management takes any action. Second, in the second sentence of the above opinion letter issued by your Office you indicated that your advice was sought "... because the office of the Comptroller processes payments for the faculty and Southern Connecticut State College. . . ." Our review of Section 24 and 22 of Article Fourth of the State Constitution of Connecticut; the predecessors of those sections in earlier constitu-

Exhibit I Annexed to Verified Application and Petition

tions; Section 3-119, Section 10-109b, and Section 10-110, Connecticut General Statutes; and the pertinent case law, in particular, *Dowe v. Egan*, 133 Conn. 112, 48 A.2d 735 (1946); indicates to us that the duties of the State Comptroller in these circumstances are purely ministerial. In the light of the views expressed in the letter of October 17, 1974, from Chairman Niejadlik to the Governor, and in the light of the provisions of Section 3-119, Connecticut General Statutes, we view it as incumbent upon the members of the Board of Trustees for the State Colleges to require that Mr. Stolberg's salary payments be kept current.

The third matter which we ask you to consider arises out of the apparent differences in views taken in this matter by the Board of Trustees for the State Colleges, by your Office as set forth in the opinion letter referred to above, and by the State Comptroller as indicated by certain news reports. We emphasize that we differ with your opinion for the reason that the State Colleges, maintained under the direction and supervision of the Board of Trustees for the State Colleges, are not within either the Executive Department or the Judicial Department of the State for purposes of Article III, Section 11 of the State Constitution. We find no decision of the Supreme Court of the State of Connecticut either directly to the contrary or on the basis of which one could argue to the contrary. The opinion letter of your Office cites no such case. Your opinion apparently is based principally on an earlier letter written by your Office, which also refers to no established Connecticut judicial precedent. We do not propose to set out

Exhibit I Annexed to Verified Application and Petition

here in detail the grounds upon which we consider that Connecticut courts would not support the opinion expressed by your Office. But we do point out is this: if the Board of Trustees for the State Colleges is not in the Executive Department, then there is no violation of the "dual job ban"; if, on the other hand, the Board of Trustees does fall within the Executive Department, then there is an obvious conflict of views between portions of that Department. The Board of Trustees views itself as bound by the District Court's judgment and orders not to interfere with the employment of Mr. Stolberg on the faculty of Southern Connecticut State College, while your Office apparently takes a different view. As we understand it, the Board of Trustees does not view itself to be part of the Executive Department. If the Board of Trustees is within the Executive Department, it would appear to be the duty of the Governor to bring about a resolution of such disparate views, if that is possible, before any action adverse to Mr. Stolberg is taken; or, if that is not possible, it may be appropriate to seek to resolve such disparate views by means of an action for a declaratory judgment such as that employed in *Dowe v. Egan, supra*.

Please advise the Governor, the State Comptroller, and the Board of Trustees for the State Colleges of these views, or, if you do not consider it appropriate to transmit them, advise us promptly and we shall send copies of this letter to such offices as are not informed by yourselves.

We appreciate your consideration of this matter, and we request an opportunity to confer with you upon it with

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Exhibit I Annexed to Verified Application and Petition

appropriate representatives of the other offices involved as quickly as possible. We shall be in touch with you personally or by telephone.

Very truly yours,

/s/ LOUIS M. WINER
Louis M. Winer

LMW/da
Encs.

EXHIBIT J ANNEXED TO VERIFIED
APPLICATION AND PETITION

[LETTER DATED NOVEMBER 18, 1974, FROM ROBERT K. KILLIAN,
ATTORNEY GENERAL OF THE STATE OF CONNECTICUT, BY
SIDNEY D. GIBER, ASSISTANT ATTORNEY GENERAL, TO
LOUIS M. WINER]

STATE OF CONNECTICUT
[Emblem]
ATTORNEY GENERAL'S OFFICE
30 TRINITY STREET
HARTFORD

ROBERT K. KILLIAN
ATTORNEY GENERAL

Telephone number
566-4990

November 18, 1974

Louis M. Winer, Esq.
Tyler, Cooper, Grant,
Bowerman & Keefe, Attorneys
P.O. Box 1936
New Haven, Conn. 06509

Re: State Representative Irving Stolberg

Dear Mr. Winer:

We have reviewed your letter of November 12, 1974 and find it does not alter our opinion as expressed to the State Comptroller on October 28, 1974.

You requested that we advise the Governor, the State Comptroller and the Board of Trustees for the State Col-

Exhibit J Annexed to Verified Application and Petition

leges of your views. As the general supervision of the legal matters of the state is vested in the Attorney General and as we have found no reason to alter the tenor of our advice to our clients, we do not deem it appropriate to forward your opinion, nor do we deem it appropriate for you to directly contact our clients.

Very truly yours,

ROBERT K. KILLIAN
Attorney General

By /s/ SIDNEY D. GIBER
SIDNEY D. GIBER
Assistant Attorney General

SDG:esd

EXHIBIT K ANNEXED TO VERIFIED
APPLICATION AND PETITION

[LETTER DATED NOVEMBER 21, 1974, FROM MANSON VAN B.
JENNINGS, PRESIDENT, SOUTHERN CONNECTICUT STATE
COLLEGE, TO MR. IRVING STOLBERG]

[Letterhead of the Southern Connecticut State College,
New Haven, Connecticut 06515]

Mr. Irving Stolberg
50 Roydon Road
New Haven, Conn. 06515

Dear Irv:

Late this morning Mr. William Brooks of the Comptroller's Office called to say that the Comptroller's Office is withholding your salary check dated November 22, 1974. Mr. Brooks said that this action was based on instructions from Mr. Nicholas Wayne upon the advice of the Attorney General's Office.

We immediately made efforts to reach you by leaving messages at both your home and office.

I will be pleased to discuss this matter with you if you so desire.

Sincerely,

/s/ MANSON
Manson Van B. Jennings
President

MVBj/p

Order to Show Cause

Upon the annexed Verified Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, and upon the Affidavit of Louis M. Winer, dated December 12, 1974, and the exhibits thereto attached, it is

ORDERED: that the defendants herein, and the following additional persons, referred to hereinafter as "respondents":

THOMAS J. MESKILL, of the Town of Hartford, individually and as Governor of the State of Connecticut;

NATHAN G. AGOSTINELLI, of the Town of Manchester, individually and as Comptroller of the State of Connecticut;

ROBERT K. KILLIAN, Esquire, of the Town of Hartford, individually and as Attorney General of the State of Connecticut;

SIDNEY D. GIBER, Esquire, of the Town of Bloomfield, individually and as Assistant Attorney General of the State of Connecticut;

HENRY J. BECKER, Jr., of the Town of Avon, individually and as one of the Auditors of Public Accounts of the State of Connecticut;

LEO V. DONOHUE, of the Town of Avon, individually and as one of the Auditors of Public Accounts of the State of Connecticut;

NICHOLAS WAYNE, of the Town of Hamden, individually and as Chief Administrative Officer at the Office of the Comptroller of the State of Connecticut;

Order to Show Cause

and WILLIAM R. BROOKS, of the Town of Avon, individually and as Payroll Officer of the Central Payroll Division of the Office of the Comptroller of the State of Connecticut;

appear and show cause at a hearing to be held before this Court, in North Court Room, United States Court House, 450 Main Street, at Hartford, Connecticut, on the 7th day of January, 1975, at 9:00 o'clock in the forenoon of that day why an order should not be made herein:

- (a) enjoining, restraining, and prohibiting, said persons from acts or omissions or the continuance of acts or omissions or in disobedience or resistance to the lawful writ, process, order, rule, decree, or command, of this Court, calculated to impair, defeat, impede, and/or prejudice the rights of plaintiff herein and otherwise calculated to harass plaintiff in connection with his reinstatement to the faculty at Southern Connecticut State College pursuant to the Judgment of this Court;
- (b) enjoining, restraining, and prohibiting, said persons from acts or omissions or the continuance of acts or omissions which cause or permit or are calculated to cause or permit the suspension, termination, or withholding, of salary payments to plaintiff for his services as a member of the faculty at Southern Connecticut State College, reinstated with tenure pursuant to the Judgment of this Court;
- (c) adjudging said persons guilty of contempt of this Court and imposing appropriate sanctions until said persons purge themselves of such contempt;

Order to Show Cause

- (d) requiring said persons to pay damages, including payment of all salary payments suspended, terminated, or withheld, and including the restoration of all insurance, retirement, and other benefits, lost as a result of such suspension, termination, or withholding, and including payment of compensation for any losses resulting therefrom, for such contempt; and
- (e) ordering such other and further relief, including assessment of attorneys' fees and expenses, as this Court deems just and appropriate in the circumstances;

AND IT IS FURTHER ORDERED: that this Order to Show Cause and plaintiff's Verified Application and Petition for Order to Show Cause and for Contempt Judgment, with the annexed affidavit and exhibits, be served upon defendants herein by delivering forty copies thereof to the Office of the Attorney General of the State of Connecticut on or before the 24th day of December, 1974, and that said defendants and respondents file a return herein by filing an answer to each of the allegations of the numbered paragraphs of said Verified Application on or before the 3rd day of January, 1975.

Dated at Hartford, Connecticut, this 16th day of December, 1974.

M. JOSEPH BLUMENFELD
United States District Judge

9:16 A.M.

Appearance

To the Clerk:

Please enter our appearance for all defendants and all respondents in the above-captioned contempt proceeding.

ROBERT K. KILLIAN
Attorney General

F. MICHAEL AHERN
Assistant Attorney General

BERNARD F. MCGOVERN, JR.
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115
Telephone: 566-4990

January 3, 1975
Date

Answer to Petition for Contempt Judgment

First Defense:

The petition fails to state a cause of action upon which the relief sought may be granted.

Second Defense:

1. Paragraphs 1, 2, 4, 5, 7, 8, 10-21 inclusive, and 25 are admitted.
2. Paragraph 3 is admitted except the final clause of the first sentence, "which defendants then claimed rendered plaintiff ineligible to serve as a member of the General Assembly" which clause is denied.
3. Paragraph 6 is admitted except for the final sentence thereof which is denied.
4. The first sentence of paragraph 22 is admitted; the remainder thereof is denied.
5. Paragraphs 23 and 24 are denied.
6. As to paragraph 9, the defendants and respondents have insufficient information or knowledge upon which to form a belief and accordingly leave the petitioner to his proof.

Defendants and Respondents

By: ROBERT K. KILLIAN
Attorney General

F. MICHAEL ABERN
Assistant Attorney General

BERNARD F. MCGOVERN, JR.
Assistant Attorney General

**Amendment to Verified Application and Petition for
Issuance of Order to Show Cause and for
Contempt Judgment**

Upon consent of defendants and respondents, endorsed below by their attorney in this proceeding, plaintiff amends his Verified Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, dated December 12, 1974, as follows:

1. By replacing the first sentence of paragraph 3 thereof with the following sentence:

"3. In their pretrial memorandum and at the pretrial conference held in this action, defendant sought and were granted leave to amend their answer to allege as an additional affirmative defense the provisions of the so-called "dual job ban", Section 11 of Article Third of the Constitution of the State of Connecticut and Section 2-5 of the Connecticut General Statutes, which defendants then claimed rendered plaintiff ineligible to serve as a member of the faculty at Southern Connecticut State College while he continued to serve as a member of the General Assembly. . . ."

2. By deleting the phrase ". . . and abandoned any further attempts . . ." from paragraph 24 thereof, as it appears in the sixth and seventh lines of said paragraph, being the fourth and fifth lines of page 12 thereof.

3. By adding the following paragraph thereto:

"26. Respondents Agostinelli, Wayne, and Brooks, were at all pertinent times agents for defendants herein, and respondents Meskill, Agostinelli, Killian, Giber, Becker, Donohue, Wayne, and Brooks, in their

*Amendment to Verified Application and Petition
for Issuance of Order to Show Cause
and for Contempt Judgment*

actions and omissions in effecting the withholding of salary payments to plaintiff as alleged herein or in causing or permitting the withholding of such payments, were and are in active concert or participation with defendants, their agents, and/or attorneys, and have actual notice of the Judgment of this Court, a copy of which is annexed hereto as Exhibit D."

Plaintiff Irving Stolberg

By LOUIS M. WINER
Tyler, Cooper, Grant,
Bowerman & Keefe
P.O. Box 1936
205 Church Street
New Haven, Connecticut 06509
Attorneys for Plaintiff

Dated: January 31, 1975.

CONSENT

Defendants and respondents, by their undersigned attorney in this proceeding, hereby consent to the foregoing amendment.

Defendants and Respondents

By ROBERT F. KILLIAN
Attorney General

F. MICHAEL AHERN
Assistant Attorney General

BERNARD F. MCGOVERN, JR.
Assistant Attorney General

Dated: January 31, 1975.

Memorandum of Decision

In February 1972 an opinion in this case found that the defendants had impermissibly retaliated against Stolberg for exercising his first amendment rights by refusing to renew his teaching contract at Southern Connecticut State College (SCSC) for the 1969-70 academic year. The defendants were ordered to "promptly offer to reinstate the plaintiff as a faculty member with tenure."¹ In the fall of 1974 Stolberg returned to work at SCSC. At that point Stolberg was, as he had been since 1970 and as he continues to be, a member of the Connecticut General Assembly. State auditors last fall concluded that Stolberg was in violation of Connecticut's dual-job ban, Conn. Const. art. III, § 11, by reason of holding these two positions. The defendant board of trustees refused to take any action with respect to Stolberg's alleged violation of the dual-job ban because of the court order in this case. The state Attorney General, by formal letter of advice dated October 28, 1974, agreed with the auditors' conclusion. The state Comptroller, on the basis of this opinion, commenced to withhold Stolberg's paycheck as a faculty member at SCSC. The board of trustees has continued to submit Stolberg's name on the payroll each pay period; the Comptroller has continued to refuse to issue a check.

On December 16, 1974, Stolberg came here seeking a contempt judgment against the defendant board of trustees plus the Governor, the Comptroller, the Attorney General,

¹ Other relief was also given, but is not relevant here. The Second Circuit affirmed in part and reversed a portion not here material. *Stolberg v. Members of the Board of Trustees*, 474 F.2d 485 (2d Cir. 1973).

Memorandum of Decision

the auditors, and certain subordinate state employees. He sought to have these respondents enjoined from interfering with his employment at SCSC and ordered to pay him the money so far withheld.

Since December 16 the parties have been busily briefing this case, delving into such issues as the power of the court to find in contempt those not parties to the original action, the applicability of the abstention doctrine, the applicability of the dual-job ban to Stolberg, and many other points. By mid-April the plaintiff had filed almost 300 pages of briefs, and an equally imposing stack of affidavits, exhibits, and stipulations. The defendants were given until June 2 to respond, and did so within that time. On June 11 the plaintiff filed a motion for an interim order that Stolberg must be paid his salary until the motion for a contempt order was adjudicated. The defendants have now requested additional time to respond to this motion.

I believe that it is time for the court to derail this somewhat incredible train of pleadings before it gets side-tracked further than it has already (if that be possible).

The point of the judgment that the board offer to reinstate Stolberg was to put him in as good a position as he would have occupied but for the unconstitutional infringement of his first amendment rights. Although the judgment did not explicitly indicate that no decision on the merits of a dual-job ban claim had been made, I indicated to the parties in open court that I did not regard this issue as being in the case.² Transcript 173. Now Stolberg seeks

² The plaintiff argues that the issue was in the case because the defendants were specifically authorized to plead the dual-job ban as a defense by the special masters pretrying the case. (Their

Memorandum of Decision

to use the judgment not as a shield against interference with his constitutional rights but as a sword predicated on grounds not litigated in the prior proceedings. This he may not do. The judgment is hereby clarified to indicate that it does not prejudice the state's right to assert its constitutional dual-job ban against Stolberg. Any complaints Stolberg may have about the assertion of this ban must be raised in a separate proceeding (most appropriately brought in the state courts). The motion for a contempt judgment is denied. It is

So ORDERED.

Dated at Hartford, Connecticut, this 23rd day of June, 1975.

M. JOSEPH BLUMENFELD
United States District Judge

report was "so ordered" by the court.) The defendants did not subsequently raise the defense, however, nor was the dual-job ban "essential to the decision" of the case. Cf. *United States Shoe Machinery Corp. v. United States*, 258 U.S. 451, 459 (1922). There is, therefore, no compulsion to regard the dual-job ban as an issue litigated in the earlier proceedings.

Judgment

This cause having come on for consideration on plaintiff's Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, and the Court (Blumenfeld, J.) having rendered a Memorandum of Decision under date of June 23, 1975, denying said motion for a contempt judgment,

It is ORDERED AND ADJUDGED that judgment be and is hereby entered denying the motion for a contempt judgment.

Dated at New Haven, Connecticut, this 25th day of June, 1975.

SYLVESTER A. MARKOWSKI

Clerk, United States District Court

By FRANCES J. CONSIGLIO

Deputy in Charge

**Brief of Defendants and Respondents in Opposition to
Petition for Contempt Judgment**

* * * * *

[Rec. Doc. No. 28, p. 3.]

... [T]his controversy came to the attention of the chief administrative officer of the State Comptroller's office, respondent Nicholas Wayne, who consulted with Deputy Comptroller William Diana as to whether the petitioner's teaching salary at S.C.S.C. [Southern Connecticut State College] could be legally paid by virtue of the dual job ban. A letter dated October 15, 1974 seeking formal advice of the Attorney General was drafted by respondent Wayne and submitted to the State Comptroller who approved and signed same. (Appendix 4). The Comptroller also sent a letter to the Board of Trustees seeking its position. (Appendix 5). By formal letter of advice dated October 28, 1974 and delivered on October 31, 1974, the Attorney General opined that the petitioner was in violation of the dual job ban. (Petition, Ex. G). This advice was based upon a 1971 opinion to the president of another state college regarding a state senator who was teaching a course at the college. (Appendix 6). The formal advice which was drafted by respondent Sidney D. Giber was approved in ascending order by Assistant Attorney General F. Michael Ahern, respondent Giber's superior, Executive Assistant Attorney General Michael J. Scanlon (M.J.S.), Deputy Attorney General C. Perrie Phillips (C.P.P.) and respondent Robert K. Killian (R.K.K.) the Attorney General. (Appendix 7).

The Comptroller's aforesaid letter of October 15, 1974 to the Board of Trustees was replied to by James A. Frost,

*Brief of Defendants and Respondents in Opposition
to Petition for Contempt Judgment*

Executive [4] Secretary of the Board of Trustees, by transmitting a copy of the chairman's aforesaid letter of October 17, 1974 to the Governor. (Appendix 8). Subsequently the Board of Trustees met in executive session on November 1, 1974, and agreed to take no action against the petitioner. (Appendix 9).

Meanwhile, on the basis of the Attorney General's advice, the respondent State Comptroller commenced withholding the petitioner's bi-weekly S.C.S.C. pay checks for the pay period commencing on November 6, 1974 and to date has continued to withhold same. The petitioner was advised of this withholding by the college president on November 21, 1974, the day before the first pay check was withheld (Petition, Ex. K). In the interim the Board of Trustees through its personnel at S.C.S.C. has continued to date to submit to the Comptroller the petitioner's name on each succeeding college payroll for payment. E.g., see Appendix 10.

* * * * *

[8] Finally, the defendants have not been wanting in diligence. They have reinstated the petitioner, placed his name on every payroll and resisted all suggestions that he be removed from his teaching position and that his name be removed from the S.C.S.C. payroll. . . .

* * * * *

*Brief of Defendants and Respondents in Opposition
to Petition for Contempt Judgment*

[20]

DUAL JOB BAN PROHIBITS PETITIONER FROM
HOLDING S.C.S.C. POSITION

In the event the Court determines to construe the state laws cited in the preceding section which comprise the dual job ban, the defendants and respondents hereby incorporate herein the Attorney General's letters of advice of February 9, 1971 and October 28, 1974 (Appendix 6; Petition, Ex. G) [21] in support of their position on this issue.

The defendants and respondents only note in passing that this proceeding underscores the wisdom of the dual job ban. Since he first took his seat in the House, the petitioner has been a member of the Joint Standing Committee on Education (T. 128; see also 1974 State Register and Manual, p. 156). All proposed legislation involving the Board of Trustees, including the appropriate parts of the appropriations bill must go before the petitioner's committee. Thus, the Board is in the anomolous position of having to please its own employee on any legislation it is seeking; or viewing the other side of the coin, the Board has its very own man on the committee through which passes all legislation affecting it. Either side of this coin presents a strong reason for the Board of Trustees' refusal to take any action to remove the petitioner, despite its knowledge that the petitioner is holding his position at S.C.S.C. illegally.

* * * * *

APPENDIX 6 TO BRIEF OF DEFENDANTS AND
RESPONDENTS IN OPPOSITION TO PETITION
TO PETITION FOR CONTEMPT JUDGMENT

STATE OF CONNECTICUT
ATTORNEY GENERAL'S OFFICE
30 Trinity Street
HARTFORD

ROBERT K. KILLIAN
Attorney General

February 9, 1971

Mr. Charles R. Webb
President
Eastern Connecticut State College
Willimantic, Connecticut

Dear Sir:

By your letter of December 8, 1970, you advised that a Senator elected to the 1971 General Assembly will be employed to teach on a part time basis at Eastern Connecticut State College during the 1971 Spring Semester. You requested that the Attorney General advise you whether such employment would be contrary to law by reason of the dual status of the Senator as a legislator and as a state employee. You are advised that such employment is contrary to law for the reasons that follow.

The Constitution of Connecticut adopted in 1965 states in Article III, Section 11, "No member of the general assembly shall, during the term for which he is elected, hold

*Appendix 6 to Brief of Defendants and Respondents
in Opposition to Petition for Contempt Judgment*

or accept any appointive position or office in the judicial or executive department of the state government, or in the courts of the political subdivisions of the state, or in the government of any county . . .”

The General Statutes provide in Section 2-5 that “No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly or any other appointing authority of this State to any position in the judicial, legislative or executive department of the state government, except as provided in this section . . .”

The references to an appointment in both the statute and the constitution are consistent with Chapter 67 of the General Statutes, the State Personnel Act, which treats an appointment as any designation for an office that does not come about by a general election by the voters. Within the context of this chapter an appointing authority is a board, commission, officer, commissioner, person or group of persons having the power to make appointments by virtue of a statute or by lawfully delegated authority [Section 5-196(c)]. Such an appointment occurred when the subject legislator was employed as a part-time member of your professional staff under the authority delegated to the Board of Trustees of Eastern Connecticut State College [Section 10-329(a); Section 5-198(1); Section 5-196(y)]. The facts recited by you are also consistent with this interpretation under other definitions set forth in the State Personnel Act [Section 5-196(i), (k), (p), (t), and (w)].

*Appendix 6 to Brief of Defendants and Respondents
in Opposition to Petition for Contempt Judgment*

The reference to Section 10-109b in the enclosures sent with your inquiry has prompted careful re-reading of that statute which describes the duties of state college trustees. In Section 10-109b the General Assembly used the word "appointing" in a manner that conforms to the definitions set forth in the State Personnel Act by the draftsman's mutual substitution of terms. While the statute does refer to the power of the board to appoint and remove the chief executive officer, executive secretary and executive staff of the institution, it immediately thereafter refers to the duties, terms and conditions of employment of the secretary and staff. This indicates an intention that these "appointees" be treated as state employees for purposes of the Act.

It is more significant, however, that the General Assembly expressly set up in Sections 5-196 and 5-198 a distinction between classified and unclassified service that encompasses every office or position in the state service, and makes an explicit reference to persons employed in teaching positions at state institutions [Section 5-196(e), (i), (w), (y) and Section 5-198(1)].

There was no intention indicated in the text of Section 10-109b to create any exception to the State Personnel Act, since none was either explicitly stated or clearly implied by this statute. This is relevant because the State Personnel Act was adopted in its present form in 1967 and was extended in the General Assembly Session of 1969. Section 10-109b was first adopted in 1965 and was later amended and extended in 1967 and 1969. In short, the work of the General Assembly on both of these statutes has been

*Appendix 6 to Brief of Defendants and Respondents
in Opposition to Petition for Contempt Judgment*

concurrent and recent. If the Legislators or the drafters of the 1965 Constitution had intended to set up a separate and unique class of State Legislators or public employee to fit the circumstances described in your letter, it cannot be questioned that they would have been aware of all of the statutes, circumstances and relationships indicated by your letter and enclosures. [30 Op. A.G. 99, 100; 82 C.J.S. pp. 634-635 at §327, fn. 86].

In your letter to the Attorney General and enclosures you have made a reference to the purpose of the constitutional provision [Article III, Section 11] and the General Statute. [Section 2-5]. These provisions of the Connecticut Constitution and the General Statutes have primary objective of establishing and preserving the separation and independence of the executive and judicial branches of the State government from the legislative branch. While the loss of the services of a teacher who is employed at a State institution of learning must be regretted, the maintenance of that separation of powers is fundamental to the checks and balances that underlie our constitutional system of government in Connecticut. [16 C.J.S. pp. 483-486, §104, see especially fns. 5 and 6 on p. 484].

Very truly yours,

ROBERT K. KILLIAN
Attorney General

Ry F. D. NEUSNER
Assistant Attorney General

Stipulation Dated January 7, 1975

* * * * *

13. On June 9, 1972, the Board of Trustees adopted a resolution authorizing the President of Southern Connecticut to write to plaintiff and to offer to reinstate plaintiff as a faculty member with tenure, and the then President of Southern Connecticut prepared such a letter, dated June 12, 1972. A copy of the Board of Trustees' Resolution and the letter dated June 12, 1972 appears as Pages 2 and 3 of Exhibit 9.

14. Plaintiff claims that he did not receive either a copy of the Board of Trustees' Resolution, dated June 9, 1972, or the letter of June 12, 1972, signed by President Jennings, before 1973, but defendants claim that the same was sent.

15. Plaintiff has [had] written to the Chairman of the Board of Trustees on April 6, 1972, to express his concern over not having received any communication as a result of the Court's decision February 29. Exhibit 8 is a copy of that letter.

16. On February 8, 1973, plaintiff made inquiry of respondent Giber, who forwarded copies of the Resolution of June 9, 1972, and the letter of June 12, 1972. Exhibit 9 is a copy of the forwarding letter and enclosures.

17. By return mail to Assistant Attorney General F. Michael Ahern, in respondent Giber's absence, plaintiff corresponded with defendants through their attorneys by letters dated February 9, 1973. Exhibit 10 is a copy of two letters sent to and through Mr. Ahern.

Stipulation Dated January 7, 1975

18. Attorneys for plaintiff and defendants continued to negotiate about the time of plaintiff's return, the rank at which plaintiff was to return, the amount to be paid plaintiff as attorneys' fees, and other matters. Attempts to settle the amount of the award of attorneys' fees by stipulation were unsuccessful, and after hearing and upon application March 12, 1974, the Court made an award March 13, 1974, upon which judgment was entered March 15, 1974, of reasonable attorneys' fees in the amount of \$16,000.00 plus taxable costs. Exhibits 11 through 27 are copies of correspondence sent or received by attorneys for plaintiff or defendants from February 27, 1973, through April 2, 1974, relating to such negotiations.

19. On June 26, 1973, plaintiff's attorney wrote to respondent Giber making several inquiries. Exhibit 17 is a copy of that letter. By letter dated July 10, 1973, respondent Giber replied:

"As to your second question: What action will the Attorney General or the defendants take if Professor Stolberg maintains his seat in the legislature and accepts reinstatement at Southern Connecticut State College? The defendants have been ordered to reinstate the plaintiff with the same seniority as if the contract had been renewed in 1969. You have received Doctor Jennings' letter which states the pay grades for assistant professor. We realize that your client has had commitments to Quinnipiac College and we are willing to make every reasonable concession required to offer the courses for which it relies upon the services of Professor Stolberg. The defendants seek to

Stipulation Dated January 7, 1975

comply not only with the letter of Judge Blumenfeld's order, but with the spirit of his order, as well. The defendants are holding open the doors to SCSC whether Professor Stolberg decides to return for the 1973-1974 school year or the 1974-1975 school year.

"You stated in your letter that your client has questions concerning the state constitution and in reply to your request for copies of any earlier opinions on the question of whether Article 3, Section 11, of the state constitution covers faculty members of a state college, I am enclosing a copy of an opinion dated February 9, 1971. I am sure that you did not intend to ask that the Office of the Attorney General make any commitments, other than on behalf of the defendants. I am confident that you will render your client your usual sound legal advice on any questions he has raised."

Exhibit 18 is a copy of that letter.

20. By letter dated February 6, 1974, plaintiff notified defendants' attorneys that he intended to return to Southern Connecticut for the 1974-1975 academic year. Exhibit 22 is a copy of that letter. By letter dated February 19, 1974, respondent Giber replied as indicated by Exhibit H and Exhibit 23 that he was personally pleased at plaintiff's decision to return to Southern Connecticut.

21. As indicated by and recorded in the minutes of the transactions of the Board of Trustees for June 7, 1974, under the heading of "Personnel Changes", the Board of Trustees recorded plaintiff's return and reinstatement at

Stipulation Dated January 7, 1975

Southern Connecticut, with the effective date of return being August 28, 1974. Exhibit 28 is a copy of the pertinent portion of the minutes.

22. The Board of Trustees reinstated plaintiff pursuant to the Court's judgment.

23. In order to place plaintiff's name back on the payroll, a "Payroll Notice", Form COP-6, was signed and submitted for plaintiff by Paul F. Lowe, Vice President for Administrative Affairs at Southern Connecticut, indicating reemployment of plaintiff at Southern Connecticut with an effective date of August 28, 1974.

24. All payrolls submitted by Southern Connecticut for the payroll period including August 28, 1974, and for subsequent periods have carried plaintiff's name. Exhibits 30 and 31 are copies of selected pages of the payrolls for Southern Connecticut for the payroll periods ending November 7, 1974, and November 21, 1974, respectively. The original of each payroll consists of 45 pages. The pages selected are the first page of the payroll, the eighth page of the payroll (which contains plaintiff's name), and the last page of the payroll which bears the certification that: "All employees listed hereon have been regularly appointed to authorized positions and have rendered the services for which payment is to be made." Each such payroll has been signed and so certified by Paul F. Lowe, Vice President for Administrative Affairs at Southern Connecticut, who is an authorized payroll officer of the state for Southern Connecticut. Similar payrolls have been submitted for Southern Connecticut for each payroll period including and after the period including August 28,

Stipulation Dated January 7, 1975

1974, similarly signed and certified by Mr. Lowe or by another officer at Southern Connecticut authorized to sign payrolls. Payroll warrants for each such payroll have been duly prepared, issued, and registered, for the disbursement of money by the Treasurer of the State of Connecticut. Payroll checks up to and including one dated November 8, 1974, have been issued upon such payrolls and delivered to plaintiff.

25. The only persons authorized to sign payrolls for Southern Connecticut are the following members of the faculty or administration there: Manson Van B. Jennings, President; Evann Middlebrooks, Vice President for Academic Affairs; Paul F. Lowe, Vice President for Administrative Affairs; Louis I. Kuslan, Dean of Arts and Science; and Robert V. O'Brien, Associate Dean for Administrative Affairs. The signature of each, and no others, has been submitted on a form prepared by the Office of the State Comptroller, "Payroll Authorization Card CO-773", signed by President Jennings.

26. Although payroll checks drawn to plaintiff's order were prepared upon such payrolls, and payroll warrants for dates on and after November 22, 1974, were duly issued and registered, respondents Agostinelli, Wayne and Brooks, acting on the basis of and as a result of the opinion written and furnished by respondents Giber and Kilian, dated October 28, 1974, reproduced as Exhibit G to plaintiff's Verified Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, withheld three checks payable to plaintiff although such checks were duly prepared. Exhibit 32 is a copy of these checks

Stipulation Dated January 7, 1975

which the Comptroller failed to deliver to plaintiff. Exhibit 33 is a copy of the corresponding Statement of Earnings and Deductions for each such check.

27. Plaintiff continues to serve as an appointed member of the faculty at Southern Connecticut. No form has been submitted by any authorized payroll officer at Southern Connecticut to terminate plaintiff's payroll status, as is required for such termination on an appropriate Form COP-6; and no form has been submitted to cancel any payroll checks upon an appropriate Form COP-9 by any authorized payroll officer at Southern Connecticut.

* * *

PLAINTIFF

By LOUIS M. WINER
Louis M. Winer
P. O. Box 1936
205 Church Street
New Haven, Conn. 06509
Attorney for Plaintiff

DEFENDANTS AND RESPONDENTS

By ROBERT K. KILLIAN
Attorney General

By BERNARD F. MCGOVERN, JR.
Bernard F. McGovern, Jr.
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
*Attorneys for Defendants
and Respondents*

Dated: January 7, 1975.

Reply Brief of Defendants and Respondents

* * *

[Rec. Doc. No. 32, p. 12.]

The plaintiff has pressed his privity theory most vigorously with respect to the Comptroller and his subordinates Wayne and Brooks; this is understandable in light of the Comptroller's duty to pay the salaries of "duly appointed" state employees. Sec. 3-119, Conn. Gen. Stat., as amended. The plaintiff has [13] founded his claim on cases which hold that the Comptroller had a ministerial duty to make certain payments and is therefore the Board's servant in this regard. Pltf's Brief, Part One, p. 48. The plaintiff's reasoning begs the entire question. Certainly if the plaintiff were not a member of the General Assembly and had rendered the teaching services to his college the Comptroller would have no choice but to pay him, i.e., he would be under a ministerial duty to pay under Sec. 3-119. . . .

22
[Signature]

**Notice of Motion and Motion for Interim Order
Re Salary Payments**

To:

BERNARD F. MCGOVERN, JR., Esquire,
Assistant Attorney General,
Office of the Attorney General,
30 Trinity Street,
Hartford, Connecticut 06115.

PLEASE TAKE NOTICE that the undersigned attorney for plaintiff herein will and does hereby respectfully move this Court, upon:

- (a) the annexed affidavit of Irving Stolberg, dated May 17, 1975;
- (b) the annexed affidavit of Louis M. Winer, dated June 10, 1975;
- (c) the "Reply Brief of Defendants and Respondents", dated June 2, 1975;
- (d) plaintiff's supporting memorandum filed herewith;
and
- (e) such hearing and other submission as this Court may order;

for an interim order in the form hereto annexed requiring that defendants and respondents restore, make, and provide, and continue to make and provide, salary payments and salary fringe benefits to plaintiff until such time as proceedings upon the Order to Show Cause herein are determined by this Court and until such further time as this

*Notice of Motion and Motion for Interim Order
Re Salary Payments*

Court specifies to permit plaintiff reasonably and equitably to comply with such orders as are entered by this Court in said proceedings.

PLAINTIFF

LOUIS M. WINER

Louis M. Winer

a member of the firm of

Tyler, Cooper, Grant,

Bowerman & Keefe

P. O. Box 1936

205 Church Street

New Haven, Connecticut 06509

His Attorneys

Dated: June 11, 1975.

**Affidavit of Irving Stolberg, Dated May 17, 1975,
Annexed to Notice of Motion and Motion for
Interim Order Re Salary Payments**

New Haven, May 17, 1975

STATE OF CONNECTICUT,
COUNTY OF NEW HAVEN, ss.:

IRVING STOLBERG, of the Town of New Haven, having been duly sworn, does depose and say:

1. I am the plaintiff in the above entitled action. I brought this action in 1969 seeking to be reinstated to my faculty position at Southern Connecticut State College, with tenure, on the grounds that the termination of my employment there was in violation of federal law.

2. By a Judgment of this Court, it was ordered that defendants offer to reinstate me with tenure at Southern Connecticut State College. Before the trial in this case, and before any Judgment, defendants had asked permission and were given permission to raise as a defense to my claim for reinstatement the issue that I was then serving in the General Assembly and was barred from returning to my faculty position at Southern Connecticut State College by state law. Although the defendants were given permission to raise this defense, they did not pursue it. I did return to my teaching position at Southern Connecticut at the beginning of the academic year 1974-1975 and gave up the teaching position that I had previously held. I did so in reliance on this Court's Judgment and in reliance on the statements and representations made by the defendants in making

Affidavit of Irving Stolberg

arrangements for my reinstatement at Southern Connecticut State College.

3. After returning to Southern Connecticut State College at the beginning of the academic year 1974-1975 I received my regular bi-weekly salary check for about the first eight weeks of my services there. Although I continue to teach at Southern Connecticut State College, I have received no salary for such services since mid-November of 1974. In order to resolve the questions that have arisen out of the interruption of my salary payments and to try to assure the future security of my position at the College, I have brought on proceedings to enforce the Judgment of this Court against defendants and others responsible for holding up my salary. I am advised that the defendants and respondents in these proceedings have requested and been granted permission to file further briefs on or before June 2, 1975

4. The Board of Trustees and the College continue to expect me to fulfill my duties as Assistant Professor at the College, which I do. I submit bi-weekly signed statements that I have performed those services and I understand that appropriate certificates for the payment of my salary are submitted to the Office of the Comptroller. That Office has refused to make such salary payments on the grounds of an opinion of the Attorney General's Office, which gave that opinion in spite of the fact that the latter Office had participated in all proceedings in this action and in the negotiations leading to my return to the College.

Affidavit of Irving Stolberg

5. In the meantime, and while the matters at issue are pending before this Court I not only receive no salary for the services I render at Southern Connecticut State College (I do receive salary of \$6,500 during the first half of 1975 as a State Legislator) but, further, I am subject to the risk that this Court may determine that I am not entitled to such salary as a faculty member, and, I am subject to uncertainties about my life insurance coverage, about my major medical and health insurance coverage, about withholding tax payments, and the like.

6. In addition, I have had to make commitments to teach at the summer school at Southern Connecticut State College and for next fall's courses there as part of my continuing service at the College.

7. During the period from mid-November of 1972 through the end of February of 1973, I had to resort to my cash savings to support my family. There was less than \$100 left in my savings at the end of that period when I received a portion of my father's estate, and I have been using those funds to support my family since. This has resulted not only in loss of interest but also in considerable strain and anxiety to me and to my family.

/s/ IRVING STOLBERG
Irving Stolberg

**Order Endorsed on Plaintiff's Motion for Interim
Order Re Salary Payments**

Motion denied after hearing held subsequent to clarification of judgment and denial of motion for contempt.
6/27/75 M.J.B.

**Excerpts From Transcript of Proceedings
and Testimony, January 7, 1975**

[25] SIDNEY GIBER, called as a witness, being first duly sworn, was examined, and testified as follows:

The Clerk: Will you state your name and address for the Court?

The Witness: Sidney D. Giber, G-i-b-e-r, 231 Wintonbury Avenue, Bloomfield, Connecticut 06002.

Direct Examination by Mr. Winer:

Q. Mr. Giber, you're an Assistant Attorney General in the Office of the Attorney General of the State of Connecticut, are you not? A. That is correct.

* * * * *

[26] *By Mr. Winer:*

Q. I call your attention to the last sentence of that [letter], that:

"We conclude that the effect of the decision of the United States District Court was to restore Irving Stolberg to his position and rank of Assistant Professor as of 1969 and that in January, 1971, when Stolberg became a member of the General Assembly, he surrendered his position at Southern Connecticut State College and that during the term for which he is elected Irving Stolberg cannot hold the position of Assistant Professor at Southern Connecticut State College". A. Are you referring to a letter of advice that I wrote? Is that what that G is that you're talking about?

[27] Q. Yes.

Sidney Giber—Direct Examination by Mr. Winer

The Court: Now, wait a minute.

October 28th?

Mr. Winer: Yes. It's the very last sentence, your Honor.

It's Exhibit G, and the very last sentence of that exhibit.

The Court: I have it.

Which portion of the letter?

Mr. Winer: The last sentence, your Honor. In particular, the statement that the effect of the decision of this Court was to restore Mr. Stolberg to his position as of 1969.

Q. When did that first occur to you? A. When did what first occur to me?

Q. That the effect of the Court's decision was to restore Mr. Stolberg to his position as of 1969. A. I don't know. You and I discussed this matter a number of times, but I have no idea when it first struck me. I don't know whether it was during conferences before this case was tried, afterwards.

At some point I read the pertinent case. I had questions in my mind as to whether Mr. Stolberg had knocked himself out of the legislature or whether he had knocked himself out of a job.

[28] And ultimately after I read the case I would presume that about the time that I finally wrote this opinion I finally worked out exactly what I wanted.

Q. And I show you Exhibit 4-41, which is a copy of a letter from Chairman of the Board of Trustees to the Governor in which he referred to the fact that, "... at the time the

Sidney Giber—Direct Examination by Mr. Winer

Court made its ruling Mr. Stolberg was a member of the General Assembly”.

Did you learn of that letter in October of 1974? A. I don't believe so. I believe that this letter arrived with perhaps the Comptroller's request for advice.

I don't recall what the date of the Comptroller's request for advice was, but at that time I believe that I then received let's call it several letters that weren't addressed to me. Now whether they came from the State Colleges or what, I don't recall.

Let me explain the way our mail comes to us so that you will have no misunderstanding on that point.

The mail that comes in addressed to the Attorney General is distributed to unit leaders. And the unit leader then redistributes it to the man in the unit. And let's say when I'm handed a package by my unit leader I don't normally inquire where did this come from.

Q. When you wrote your opinion letter did you understand that the trustees had taken the position that they had [29] reinstated Mr. Stolberg pursuant to this Court's judgment? A. On my advice they had.

Q. Now, Exhibit 4-44 is a copy of the request for approval that went up the ladder in the Attorney General's Office, is it not? A. Yes.

Q. When that went up did you advise the persons in the Attorney General's Office who passed on this letter that Mr. Stolberg had been reinstated by the trustees on your advice? A. I think they were all aware of it.

Mr McGovern: I believe we can stipulate to that fact, your Honor, because it's right in the letter itself; in the first page of that letter.

The Court: Yes.

Sidney Giber—Direct Examination by Mr. Winer

Mr. McGovern: So we would stipulate that Mr. Ahern knew it, who is an attorney of record in the case, Mr. Scanlon knew it, Mr. Phillips knew it and Mr. Kelly [Killian] knew it.

By Mr. Winer:

Q. Did you advise the members of the Attorney General's Office who passed on that request that your office, on behalf of the defendants, had requested leave of the Court to amend the pleadings to add this as a defense before the time of trial, had been granted that request, and had not so amended their pleadings? [30] A. My unit leader was aware of it. I believe that I mentioned it at one time or another to the Attorney or the Deputy.

Q. Who is your unit leader. A. F. Michael Ahern.

The Court: Who?

The Witness: F. Michael Ahern.

Q. And when was it that the Attorney General was aware of this? A. I don't recall.

Q. Was it before or after you sent your letter? A. Which letter?

Q. Excuse me. The letter of October 28th, 19— A. Before then.

Q. Mr. Giber, you did receive a copy of the pre-trial report in this case, did you not? A. Pre-trial report? You mean— Yes, I believe so. Yes.

Q. And it is a matter of record, is it not, that the answer was never thereafter amended? A. That's correct.

Mr. Winer: That's all.

• • • • •

**Excerpts From Transcript of Proceedings,
June 27, 1975**

[9]

* * * * *

Mr. McGovern: I don't know if it is the [10] plaintiff's position today that the Board should be paying him, or just that the Court should issue an order prohibiting the Board of Trustees from taking any action which would cause Mr. Stolberg to cease teaching classes.

Now, we have an opinion which was written by Mr. Giber and, of course, was the subject of this contempt proceeding, which in effect stated, I guess it stated explicitly, that Mr. Stolberg was deemed to have resigned implicitly his position with the Board of Trustees of the state colleges, that is, by being elected and taking his seat on the legislature.

As far as we are concerned right now, Mr. Stolberg is a volunteer, at best, in his position. Certainly as far as any quantum meruit relief is concerned, we feel that's a state issue and, secondly, quantum meruit applies only where there is an expectation of payment on the part of both sides; a regular or implied contract having failed, that there it would be to provide for unjust enrichment.

Here I think it is pretty clear that neither party can claim there was any expectation that Mr. Stolberg would be paid for his services because [11] it was made clear back in November that he wouldn't be paid for his services. So as far as the state is concerned at this particular point in time he is a mere volunteer.

The Court: Whether or not his being sworn in as a member of the legislature effectively terminated his contract is a question that I don't feel I'm called upon to pass on.

Did I say "not qualified"? Well, neither qualified nor have the jurisdiction to pass on.

Colloquy

But it is a very interesting question: Which job don't they pay him for? I mean he has binding obligations and relationship with the state through its Board of Trustees here at this college. He had that job and he continued to perform those services. And they continued to accept him, I suppose.

Now which pay he can't get, I don't know. It's a constitutional provision, isn't it, the dual job ban?

Mr. McGovern: That has been precisely our point—strictly state issues involved in the state court.

The Court: What does it say, the language of it?

Mr. McGovern: In essence, it says that no [12] member of the Legislative Branch of government shall, for the term during which he is elected, hold a position on the Executive Branch or the Judicial Branch. I think the words are "... be appointed to a position". And I think there's the converse applying to people in the Executive and Judicial Branch holding positions in the Legislative Branch—words to that effect.

But Mr. Winer isn't the only person here with a problem, I suppose, because the board is concerned as to whether they should be allowing this person to be teaching at their school, even on a volunteer basis, if in fact he is in violation of the constitution.

They don't want to be in violation of any state laws. But by the same token, they don't want to be in contempt of the Court's judgment. And, of course, they don't want to be back here in court on another contempt issue.

The Court: Well, they'd better watch out, then.

Colloquy

Mr. McGovern: Well, I don't know. I think probably until Mr. Stolberg takes some affirmative state action, I think we will have no choice but to maintain the status quo.

If he wants to come and teach, he's free to [13] come and teach. The board will even assign him his usual courses. They're not unhappy with his teaching performance. That's not in issue.

But by the same token, we are loath to go through another contempt proceeding with all the aggravation that we went through in the last one.

So I think we will have no choice but to allow him to show up and teach—although we do have some doubts about that.

If the Court would feel free to clarify its judgment even further and indicate that if we did indicate to Mr. Stolberg that he would not be assigned classes, that we wouldn't be in contempt, and that this is strictly a state matter, we would feel a lot more comfortable ourselves in that regard.

The Court: Well, I can speak just informally. Of course, it's on the record—but having restored him to his position they complied with the order of the Court. That was the judgment.

Now, if something has happened since and they then discharge him or separate him for some other basis, that does not rest on a violation of his constitutional rights. That's another case.

I mean he wasn't given a guaranteed for life job there. He got tenure, but no guarantee that [14] he's going to be able to get the salary of that job if he doesn't do the work or if he does something that's improper that would justify his separation. It is another case.

Mr. McGovern: That is precisely my feeling.

Colloquy

The Court: I mean that's the way I think I would look at it.

Mr. McGovern: I was just wondering what the Court's feeling on this would be.

The Court: Now, I'm not sure that they could say: "You have taken this other job as a legislator in full view of the constitutional ban against holding two jobs and, therefore, the one you took means that you have to give this one up". I'm not sure that's what a Court would say, or whether at some point he has to make a choice if he wants to get paid.

Mr. McGovern: We feel strongly that, first of all, this matter will be litigated one way or another. But since it involves strictly state issues, we feel that the state courts are the proper forum and we feel we are wasting time by being down here on a contempt citation, and we are a little leery of having to come back again on another contempt citation if we tell them:

[15] "Well, Mr. Stolberg, it appears from the Attorney General's opinion that you cannot hold both jobs, you are deemed to have given up your job at Southern Connecticut, we are going to be down here again having another six month contempt proceeding on that particular issue". That's our problem.

The Court: Well, I don't know what your authority is, Mr. McGovern, but I might suggest that you, your Department, might undertake to seek clarification by asking for a declaratory judgment.

You are in this situation and whether or not there's an obligation to continue to treat him as an employee, in view of the fact that he got sworn in as a member of the legislature. And that kind of goes back almost to ab initio to the

Colloquy

time that the Comptroller took that position and withheld his salary.

Mr. McGovern: It would.

The Court: So I don't know that you have to sit in this uncertain position. And I don't know that it would be out of character for the Attorney General's Office to attempt to seek this kind of a resolution of the matter, because you are dealing with a member of the legislature who is entitled to some consideration.

[16] Mr. McGovern: Certainly.

The Court: And so what you want is a judicial determination. And if they don't move, I don't see why the Attorney General shouldn't move.

It would seem to me that this would be a courteous and effective—that is, legally effective—action to take.

Mr. McGovern: We have already taken our position on this.

The Court: I know you've taken a position. But I think you could do more.

You know, just as a matter of not only position, but as a matter of concern when you are dealing with a member of the legislature and a professor at one of your universities. This is certainly something you can see that it's a very difficult position for Mr. Stolberg to be in, you recognize that, and I would think that it is the kind of situation where you just might not take the ordinary litigious posture of saying let him bring his action and see what he's going to do.

Now that's only a suggestion I make, and perhaps you can take it up with Mr. Ajello.

Mr. McGovern: I will, Your Honor.

* * * * *

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes
and says, that on the 22 day of Dec 19 75, at 3:30o'clock
P.M. he served the annexed Joint Appendix, No. 75-7426
in Re: Irving Stolberg v. Members of the Board of Trustees
for the State College of the State of Connecticut
upon Carl R. Ajello, Attorney General

Esq(s) , Attorney(s)

for Defendants-Appellees and Respondents-Appellees

by depositing 1 true copies

thereof in a Post Office Box regularly maintained by the Government
of the United States and under the care of the Postmaster of the
City of New York at Village Station, New York, N. Y. 10014, enclosed
in a securely closed wrapper with the postage thereon prepaid, ad-
dressed to said attorney(s) at (his/their) office

30 Trinity Street
Hartford, Conn. 06115

that being the address designated in the last papers served herein by
the said attorney.

Sworn to before me this 22nd
day of December 19 75

John Alusick
JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1976